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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1982

ALUMINUM COMPANY OF AMERICA, et al.,
Petitioners,

v.

CENTRAL LINCOLN PEOPLES' UTILITY DISTRICT, et al.,
Respondents,

and

PETER JOHNSON, as Administrator of the Bonneville
Power Administration, Department of Energy,
and JAMES EDWARDS, as Secretary of the
Department of Energy, and the
UNITED STATES OF AMERICA,
Respondents.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

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QUESTION PRESENTED

This is the first case to arise under the Pacific Northwest Electric Power Planning and Conservation Act, Pub. L. No. 96-501, 94 Stat. 2697, 16 U.S.C. §§ 839-839h (1980) ("Act"), a unique regional power planning statute that significantly altered the traditional distribution of rights to federal power accorded public and private customers of the Bonneville Power Administration ("BPA"). Jurisdiction to review final agency action under the Act is vested exclusively in the United States Court of Appeals for the Ninth Circuit ("Ninth Circuit"), 16 U.S.C. § 839f(e)(5), thus precluding consideration of the question here presented by other Courts of Appeal.¹ It therefore appears that this petition presents the first and only opportunity for review of the following question:

Did the Ninth Circuit, in determining that BPA "unreasonably" interpreted its statutory mandate to supply federal power to nonpreference industrial customers, contravene established principles of judicial review and improperly burden Congress's plenary authority to prescribe the scope and application of statutory preference rules?

¹Because of this exclusive review provision, no actual conflict can arise among the Circuit Courts of Appeal in interpreting the Act's provisions. However, as argued herein, the Ninth Circuit's decision interpreting the meaning and application of preference rules under the Act conflicts in principle with the decision of the Sixth Circuit in *Volunteer Electric Cooperative v. Tennessee Valley Authority*, 139 F.Supp. 22 (E.D. Tenn. 1954), *aff'd* 231 F.2d 446 (6th Cir. 1956), interpreting the meaning and application of preference rules under the analogous Tennessee Valley Authority Act, 16 U.S.C. §§ 831-831dd (1933).

LIST OF PARTIES AFFECTED

Petitioners Aluminum Company of America, Georgia-Pacific Corporation, Pennwalt Corporation, Reynolds Metals Company, Intalco Aluminum Corporation, Crown Zellerbach Corporation, Hanna Nickel Smelting Company, Alumax Pacific Corporation, Kennecott Corporation, ARCO Metals Company, Kaiser Aluminum & Chemical Corporation, Pacific Carbide & Alloys Company, Oregon Metallurgical Corporation, and Martin-Marietta Aluminum Company are direct service industrial customers ("DSIs") of the Bonneville Power Administration.² Petitioners DSIs appeared as Respondents-Intervenors before the Ninth Circuit.

Respondents Public Utility District No. 1 of Chelan County, Public Utility District No. 1 of Cowlitz County, Public Utility District No. 1 of Douglas County, Public Utility District No. 1 of Snohomish County, Public Utility District No. 2 of Grant County, City of Seattle, City Light Department, and City of Tacoma, Department of Public Utilities are municipal corporations organized and existing under the laws of the State of Washington. Respondents Central Lincoln Peoples' Utility District, Clatskanie Peoples' Utility District, Northern Wasco County Peoples' Utility District, and Tillamook Peoples' Utility District are public corporations organized and existing under the laws of the State of Oregon. Respondent Eugene Water & Electric Board is a part of the City of Eugene, a municipal corporation organized and existing under the laws of the State of Oregon. Respondents public utilities appeared as Petitioners before the Ninth Circuit. Respondent Public Power Council is a non-profit corporation organized and existing under the laws of the State of Washington, consisting of over one hundred publicly-owned and consumer-

²Pursuant to Rule 28.1 of this Court's Rules, Petitioners' parents, subsidiaries (except wholly owned subsidiaries), and affiliates are listed in Appendix R.

owned electric utilities. Respondent Public Power Council appeared as a Petitioner-Intervenor before the Ninth Circuit.

Respondents Portland General Electric Company, CP National Corporation, Pacific Power & Light Company, Puget Sound Power and Light Company, Montana Power Company, and Idaho Power Company are investor-owned utilities ("IOUs") who buy power from BPA for resale to consumers in the Pacific Northwest. Respondents IOUs intervened below and were aligned by the Ninth Circuit as Petitioners-Intervenors. However, their position on the merits before the Ninth Circuit was contrary to the position of the publicly-owned utilities.

Respondent Peter Johnson is the Administrator of the Bonneville Power Administration, a federal agency within the Department of Energy. Respondent James Edwards was the Secretary of the Department of Energy, an agency of the United States. Federal Respondents appeared as Respondents before the Ninth Circuit and, as is apparent from the briefs and the Opinion below, were aligned on the merits with the DSIs. These federal parties have been styled Respondents herein because it is uncertain at the time of filing whether they intend to petition for certiorari.

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| Senate Committee on Energy and Natural Resources, Pacific Northwest Electric Power Planning and Conservation Act, S. Rep. No. 272, 96th Cong., 1st Sess. (1979), <i>reprinted in U.S. Dept. of Energy, Legislative History of the Pacific Northwest Electric Power and Conservation Act 445</i> (Bonneville Power Administration Library, 1981) | 8, 15, 23, 26, 28 |

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Department of Energy, and the
UNITED STATES OF AMERICA,
Respondents.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

Petitioners Aluminum Company of America, *et al.*, ("Petitioners") respectfully pray that a writ of certiorari issue to review the judgment and Opinion ("Opinion") of the United States Court of Appeals for the Ninth Circuit ("Ninth Circuit").

JURISDICTION

The Ninth Circuit's Opinion was rendered on April 6, 1982 and thereafter amended by Order dated September 7, 1982. A timely petition for rehearing *en banc* was denied on September 27, 1982, and this petition for certiorari was filed thereafter within 90 days. The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

OPINION BELOW

The Ninth Circuit's Opinion as amended, reported at 686 F.2d 708, appears in Appendix A attached to this Petition.

STATUTORY PROVISIONS INVOLVED

The principal provisions of the Pacific Northwest Electric Power Planning and Conservation Act ("Act"), Pub. L. No. 96-501, 94 Stat. 2697, 16 U.S.C. §§ 839-839h (1980) [Appendix B], bearing upon the administrative actions here at issue are as follows:

DEFINITIONS

SEC. 3. As used in this Act, the term—

(17) "Reserves" means the electric power needed to avert particular planning or operating shortages for the benefit of firm power customers . . . and available . . . (B) from rights to interrupt, curtail, or otherwise withdraw, as provided by specific contract provisions, portions of the electric power supplied to customers.

[16 U.S.C. § 839a(17)]

SALE OF POWER

SEC. 5.

(a) All power sales under this Act shall be subject at all times to the preference and priority provisions of the Bonneville Project Act of 1937. . . . (16 U.S.C. 832-832l)

[16 U.S.C. § 839c(a)]

(b)(1) Whenever requested, the Administrator shall offer to sell to each requesting public body and cooperative entitled to preference and priority under the Bonneville Project Act of 1937 and to each requesting investor-owned utility *electric power to meet the firm power load* of such public body, cooperative or investor-owned utility in the Region *to the extent that such firm power load exceeds—*

(A) *the capability of such entity's firm peaking and energy resources used . . . to serve its firm load in the region . . .* (Emphasis supplied.)

[16 U.S.C. § 839c(b)(1)(A)]

* * *

(d)(1)(A) The Administrator is authorized to sell in accordance with this subsection electric power to existing direct service industrial customers. *Such sales shall provide a portion of the Administrator's reserves for firm power loads within the region.* (Emphasis supplied.)

(d)(1)(B) . . . [T]he Administrator shall offer in accordance with subsection (g) of this section to each existing direct service industrial customer an initial long term contract that provides such customer an amount of power equivalent to that to which such customer is entitled under its contract dated January or April 1975 providing for the sale of "industrial firm power."

[16 U.S.C. § 839c(d)(1)(A)-(B)]

* * *

(f) The Administrator is authorized to sell, or otherwise dispose of, electric power . . . *that is surplus to his obligations incurred pursuant to subsections (b), (c), and (d) of this section* in accordance with this Act and other Acts applicable to the Administrator. . . . (Emphasis supplied.)

[16 U.S.C. § 839e(f)]

(g)(1) As soon as practicable within nine months after December 5, 1980, the Administrator shall commence necessary negotiations for, and offer, initial long-term contracts . . . simultaneously to—

(A) existing public body and cooperative customers and investor-owned utility customers . . . ;

(B) Federal agency customers . . . ;

(C) electric utility customers . . . ; and

(D) direct service industrial customers. . . .

[16 U.S.C. § 839e(g)(1)(A)-(D)]

• • •

(g)(7) *The Administrator shall be deemed to have sufficient resources for the purpose of entering into the initial contracts specified in paragraph (1)(A) through (D).* (Emphasis supplied.)

[16 U.S.C. § 839e(g)(7)]

CONSERVATION AND RESOURCE ACQUISITION SEC. 6.

• • •

(a)(2) . . . The Administrator shall acquire, in accordance with this section, sufficient resources—

(A) to meet his contractual obligations

[16 U.S.C. § 839d(a)(2)(A)]

SAVINGS PROVISION SEC. 10.

(c) Nothing in this chapter shall alter, diminish, abridge, or otherwise affect the provisions of other

Federal laws by which public bodies and cooperatives are entitled to preference and priority in the sale of federally generated electric power.

[16 U.S.C. § 839g(c)]

INTRODUCTION

This is the first case to arise under a comprehensive new statute described by its Congressional sponsors as "without any doubt . . . the most important bill ever to have affected the Pacific Northwest."³ It concerns the scope of Congress's authority to prescribe the terms under which federal power will be sold to publicly-owned utilities and cooperatives ("preference customers"), and privately-owned utilities, federal agencies, and industrial customers ("nonpreference customers").

Although regional in application, the Act is of national significance because for the first time Congress has created statutory entitlements to federal power for individual nonpreference customers. While plainly representing a departure from Congress's 70-year tradition of delegating to administrative agencies responsibility for the allocation of all federal power and according to publicly-owned utilities and cooperatives "preference and priority" in such administrative allocation, this departure was deemed necessary in order to assure the provision of low-cost regional operating reserves, to make possible significant rate relief for residential and small farm consumers, and to forestall an anticipated struggle over scarce federal power supplies. At the same time, Congress carefully limited the duration of such nonpreference entitlements and retained preference rules to govern administrative allocation of federal power to which rights had not been specifically assigned by statute.

The Ninth Circuit's Opinion shatters this Congressional plan. By striking contract provisions designed to assure

³125 Cong. Rec. S 11592 (daily ed. Aug. 3, 1979) (remarks of Sen. Hatfield) [Appendix C].

power for industrial customers, and requiring instead that BPA sell a portion of this power to certain publicly-owned utilities whose regional requirements Congress already had met, the Opinion directly impairs BPA's ability to achieve these statutory goals and maximize efficient operation of the federal power system. It does so in stated reliance upon a preference tradition that was altered by the Act in order to assure BPA's service of these very industrial customer loads.

Indeed, the Ninth Circuit's Opinion so directly overturns Congress's express distribution of preference and nonpreference power entitlements that it suggests a fundamental assault upon the exercise of legislative discretion in allocating federal resources. In holding BPA's statutory interpretation "unreasonable" while acknowledging its support in the legislative history, 686 F.2d 708, 713-14 & n.6, the Opinion subjects that interpretation to heightened scrutiny—a standard of review normally reserved for the vindication of fundamental Constitutional rights. The Opinion can be understood only as proceeding from the assumption that preference rules once articulated become presumptively immune from statutory revision unless so declared by "explicit" Congressional exception. Judicial creation of such a presumption—and corresponding elevation of preference to a quasi-Constitutional interest—plainly misconceives the statutory origin of all preference rules and ignores several previous instances in which Congress has reserved power for nonpreference customers even while expressly reaffirming statutory preference rights.

Although preference provisions may be found in numerous federal statutes and are of great significance in the distribution of federal power, this Court has never before considered the nature and operation of preference rules. That consideration is now urgent. Properly understood, preference is simply a statutory mechanism used by Congress to govern federal agencies in the allocation of uncommitted power when that power is insufficient to sat-

isfy both preference and nonpreference customers. The preference mechanism, once established, has never been viewed as an overriding principle of entitlement immune from statutory revision; Congress is entirely free to allocate certain power directly to nonpreference customers, while retaining preference rules to govern administrative allocation of all remaining uncommitted power. That is precisely the scheme intended by Congress under the Act. If the Opinion is allowed to stand, Congress's plenary authority to allocate power among public and private customers in responding to changing power supply conditions will be improperly and dangerously burdened.

It would be difficult to overstate the significance of the Ninth Circuit's Opinion. Beyond the threatened loss to BPA of operating efficiencies, revenues, and the massive rate subsidy intended for residential and farm consumers throughout the region,⁴ the Opinion affects nearly a quarter of the power supplied to industries which produce in the Northwest a third of the nation's primary aluminum and large quantities of other strategic metals and chemicals vital to the national defense and domestic economy. Under the Opinion, a portion of the power needed by these industries in order to continue operations is subject to claim at any time by a small group of preference utilities who already are guaranteed sufficient power for their own consumers, and who will simply resell this "extra" power at a higher price to other buyers. The Opinion thus jeopardizes the survival of industries whose continued regional operation Congress expressly sought to assure in the Act, as well as the jobs, revenues, and goods these industries produce.

⁴For service this year under the contracts at issue, BPA proposes to charge its industrial customers nearly \$600,000,000. Of this amount, nearly \$200,000,000 will be used to provide rate relief for Northwest residential and small farm consumers, who are served by nonpreference investor-owned utilities also allocated power by Congress under the Act.

In sum, by disregarding established principles of judicial review and by subverting Congress's formulation of preference and nonpreference rights under the Act, the Opinion unravels four years of legislative effort and imposes potentially devastating consequences for Pacific Northwest power service.

STATEMENT OF THE CASE

Pursuant to the Bonneville Project Act of 1937, 16 U.S.C. §§ 832-832l, and subsequent legislation, BPA for over 40 years has marketed federal power generated from the Columbia River System ("System") to publicly and privately owned utilities, federal agencies, and direct service industries ("DSIs") in the Pacific Northwest. Through the early 1970's the System produced sufficient power for all BPA customers. The region's supply was augmented by certain utilities ("generating utilities"), which built and operated their own power generating facilities and thus needed to purchase from BPA only part of the power required for their consumers.

As demand steadily increased, however, and the System's finite generating potential reached its limits, significant regional power shortages were forecast. Since BPA lacked authority to acquire additional power, it was constrained by statutory preference rules to eliminate sales to non-preference customers as their existing contracts expired, and prepare a program for administrative allocation of its fixed power supplies. Given the cost differential between low-priced federal power and expensive alternatives, potential claimants began vigorous efforts to secure the largest possible share of this allocation. The prospect of a "regional civil war" threatened complete disruption of the System. *See, e.g.,* House Committee on Interstate and Foreign Commerce, Report ("House Commerce Report"), *H.R. Rep. 976 (I)*, 96th Cong., 2d Sess. 23-27 (1980), *reprinted in part in* 1980 U.S. Code Cong. & Ad. News 5989-93 *and in* U.S. Department of Energy, *Legislative History of the Pacific Northwest Electric Power and Conservation Act*

355-59 (Bonneville Power Administration Library, 1981) [Appendix D, at D60-D66]; House Committee on Interior and Insular Affairs, Report ("House Interior Report"), *H.R. Rep. No. 976 (II)*, 96th Cong., 2d Sess. 26-32 (1980), *reprinted in part in 1980 U.S. Code Cong. & Ad. News 6023-30 and in U.S. Dept. of Energy, Legislative History of the Pacific Northwest Electric Power and Conservation Act 268-274* (Bonneville Power Administration Library, 1981) [Appendix E, at E68-E78]; Senate Committee on Energy and Natural Resources, Report ("Senate Report"), *S. Rep. No. 272*, 96th Cong., 1st Sess. 17-18 (1979), *reprinted in U.S. Department of Energy, Legislative History of the Pacific Northwest Electric Power and Conservation Act 461-62* (Bonneville Power Administration Library, 1981) [Appendix F, at F37-F40].

Faced with this situation, Congress intervened and allocated power to preference and nonpreference customers by statute, "specifying directly how much power each class of BPA customer is to receive, and at what cost." 126 Cong. Rec. H 9864 (daily ed. Sept. 29, 1980) (remarks of Rep. Foley) [Appendix G].⁵ Under the Act, BPA for the

⁵The need for direct Congressional intervention was understood and expressly recognized. As explained in the *House Commerce Report*, at 31, 36-37 [Appendix D, at D72, D80-D82]:

Half of the power in the Northwest is relatively low-cost Federal power. All of that power is presently committed by contracts that begin expiring in 1981, and Bonneville lacks the authority to add significantly to supplies. Thus, allocation of Federal power cannot be avoided; the only issue is whether the reallocation will be legislated by Congress or performed administratively by the Administrator of BPA. An administrative allocation will be fought over for years in the courts because the amount of Federal power is sufficiently large and its cost is sufficiently low that none of the utilities or the industries served directly by BPA can afford not to take part in the impending courtroom battles. Without a legislative allocation of Federal power, disruption in the region is virtually inevitable.

. . .

BPA, in a May 20, 1979, document outlining issues relative to this legislation, said:

first time was directed to supply power to nonpreference utility and industrial customers under 20-year contracts, *see* Section 5(g)(1), which contracts specifically were exempted from preference customer challenge, *see* Section 5(g)(7). Congress retained existing preference rules to

Under the preference clause, this fixed quantity of BPA power must eventually be offered solely to the public bodies and cooperatives, since the projected needs of these preference customers will in future years exceed the total BPA supply. Given its limited power supply, BPA cannot execute new firm power sales contracts with nonpreference customers such as investor-owned utilities (IOU's) and direct service industries (DSI's) as proposed in the legislation. These facts have set the stage for an imminent and protracted legal battle within the Northwest over the meaning and application of the preference clause, the formation of new preference utilities or other entities claiming preference status, and the fate of the DSI's and the vital power reserves that BPA's contracts with the DSI's provide for the region.

• • •

The proposed allocation system can be carried out only through new contracts between BPA on the one hand and preference customers, IOU's and DSI's on the other. But under the present law, BPA cannot execute such contracts. The fixed supply of BPA power is too small to meet even the full future requirements of preference customers in the future, and therefore contracts with the nonpreference IOU's and DSI's are legally precluded. This is true even though the total supply of Federal plus non-Federal power in the region is, and can remain, sufficient to meet the region's total loads. BPA simply cannot obtain the non-Federal power under present law.

The [legislation] seeks to address the allocation issue by directing in section 5(g) that BPA commence, within nine months after enactment, negotiations and offer initial long-term, not to exceed 20 years, contracts to each of the following types of customers:

- (A) existing public body and cooperative customers and [nonpreference] investor-owned utility customers;
- (B) [nonpreference] Federal agency customers;
- (C) electric utility customers; and
- (D) [nonpreference] direct service industrial customers.

govern BPA's sale of all power not specifically allocated under these initial 20-year contracts, *see* Sections 5(a) and 10(c), and for the first time granted BPA authority to acquire power sufficient to support future contracts with all customers, *see* Section 6.⁶

One of Congress's primary purposes in assuring continued service to the DSIs for at least twenty years was to enable BPA's maximum efficient operation of System resources. Industrial customer loads are uniquely capable of withstanding instantaneous power interruptions without suffering damage to production equipment. By retaining the right to interrupt a portion of DSI power deliveries, BPA can secure low-cost regional operating reserves to protect other customers from temporary power shortages. In all other regions of the country, such reserves are provided only through standby generating facilities that impose significant costs upon consumers and produce no revenues except when utilized to generate reserve power. BPA's alternative arrangement—made possible solely by its industrial customers—permits most Northwest generating facilities to earn revenues continuously, thus reducing costs for all customers and minimizing the number of power plants needed to serve regional loads.

Congress's strong desire to retain these benefits of industrial customer service is reflected in the Act and well-chronicled in the legislative history. Congress required BPA to incorporate in its DSI contracts provisions assuring that a portion of the power allocated to the DSIs would remain subject to interruption by BPA for use as emergency reserves, *see* Section 5(d)(1)(A), and obligated the DSIs to pay significantly higher rates than BPA's preference utility customers in order to subsidize the residential consumers of nonpreference utilities. The reserve/revenue function thus assigned to industrial customer service was viewed as critical for the region.⁷

⁶*See* pp. 18-27 *infra*.

⁷These central statutory purposes of industrial customer service are explained in the legislative history:

While direct allocation of federal power to nonpreference customers represented a departure from the prior law, it was a departure considered necessary to secure the reserve/revenue advantages of DSI service and to avert prolonged litigation over administrative allocation of fixed BPA power supplies. At the same time, however, these mandated nonpreference entitlements were limited to initial 20-year contracts, and preference rules specifically were retained to govern BPA's sale of all power not allocated by Congress. Through new contracts with its industrial customers, BPA faithfully executed this statutory plan precisely as it had advised Congress it would do during four years of legislative hearings, and precisely as required by the Act.

Respondent preference utilities challenged these new DSI contracts claiming that provisions limiting the pur-

The [legislation] specifically authorizes the Administrator to enter into new contracts with these direct service industries. These contracts will provide power in amounts equal to, but not greater than, that which these companies are now entitled under existing contracts with BPA, and the terms of these contracts will require that these companies continue to supply reserves for the region.

These industries will also pay significantly higher rates under the new contracts. These higher rates permit the Administrator to enter into contracts with the region's investor-owned utilities for an exchange of power equal to the utilities' residential load. This exchange will permit residential customers of investor-owned utilities to share in the benefits of the lower-cost Federal resources. The power sold to BPA will be sold at the utilities' average system cost and purchased back at the rate paid by the preference customers' utilization [sic] their general requirements. The loss in revenue to the Administrator is in effect returned by the higher direct service industry rates. By providing these residential customers wholesale rate parity with residential customers of preference utilities, the amendment serves in a substantial way to cure a major part of the allocation problem.

House Commerce Report, at 29 [Appendix D, at D69]. See also 126 Cong. Rec. S 14691 (daily ed. Nov. 19, 1980) (Remarks of Sen. Jackson) [Appendix J].

poses for which BPA can restrict DSI power deliveries violated the Act's preference rules by denying Respondents the unfettered right to appropriate this power for their own uses. BPA and the DSIs argued below that these contract provisions reflect explicit statutory language and are consistently affirmed in the Act's legislative history.⁸ Congress, they argued, directly allocated power to the DSIs, and authorized BPA to restrict deliveries of this power only in furtherance of specific regional interests.⁹ Preference rules as retained under the Act govern preference customer rights to power remaining *after all* statutory customer entitlements have been met, but do not diminish these mandated allocations.

Although acknowledging that BPA's statutory interpretation is entitled to substantial deference and finds support in the Act's legislative history, the Ninth Circuit nevertheless found that interpretation "unreasonable" and struck the disputed contract provisions. Proceeding from the premise that the power at issue had not been statutorily allocated to the DSIs, the Court held that BPA violated the Act's preference rules by limiting its contract rights to

⁸The Opinion concludes that Congress neither "intended" nor "ratified" the disputed DSI contract provisions, 686 F.2d 708, 713 & n.5, but completely overlooks Congress's statement that it "understands and intends" these provisions just as they were explained by BPA at Congress's request.

⁹Under both pre- and post-Act contracts the DSIs have been allocated an "amount of power," measured in kilowatts, sufficient for their full loads. Section 5(d)(1)(B). The pre-Act DSI contracts [Appendix N] permitted BPA to restrict 25% of this power "at any time." The new contracts [Appendix H] permit such restriction "at any time and for any reason in order to protect Bonneville's ability to meet its Firm Obligations." This change implements the specific reserve functions assigned to DSI loads under §§ 3(17) and 5(d)(1)(A) of the Act, and eliminates BPA's pre-Act practice of restricting delivery of this DSI power at the unfettered request of preference utilities. It is the lawfulness of this change that is at issue here. See pp. 24-27 *infra*.

restrict DSI power deliveries, thereby denying preference utilities the use of such power as they deem fit.¹⁹

By virtue of this holding, the authority to determine the purposes for which industrial customer loads may be interrupted has been shifted from Congress and the responsible federal agency to preference utility customers. It is from this decision that the instant Petition follows.

REASONS FOR GRANTING THE WRIT

THE DECISION BELOW VIOLATES ESTABLISHED PRINCIPLES OF JUDICIAL REVIEW AND DIRECTLY CONTRAVENES CONGRESS'S STATUTORY PLAN FOR ALLOCATING FEDERAL POWER TO NON-PREFERENCE CUSTOMERS

1. In Misapplying Preference Rules Under the Act the Opinion Subjects BPA's Statutory Interpretation to a Heightened and Improper Standard of Review.

While reciting the proper review standard and acknowledging the basis for BPA's statutory interpretation in the legislative history, the Ninth Circuit *sub silentio* applied an extraordinary standard of review in holding that interpretation to be "unreasonable." Characterizing the disputed contracts as denying preference customers the right to certain power, the Court declined to credit Congress with having intended this arrangement absent a "more direct" mandate. 686 F.2d 708, 713. Such scrutiny—which accords to preference interests presumptive immunity from legisla-

¹⁹The Court also assumed that preference utilities use such power for their own consumers, rather than for resale to other utilities and DSIs. 686 F.2d 708, 715 n.9. This assumption is simply wrong. Under the Act Congress provided sufficient power to serve the consumers of all utilities, and the power at issue here will be resold by Respondent preference utilities at higher prices to other utilities and to the DSIs themselves. See pp. 29-30 & n.28 *infra*.

tive revision—finds no support in prior decisions articulating the standards for judicial review of administrative action. This Court has repeatedly held that an agency's interpretation of its own enabling statute is entitled to substantial deference, *CBS v. Federal Communications Commission*, 453 U.S. 367, 382 (1981); *United States v. Rutherford*, 442 U.S. 544, 553 (1979), particularly when the law is new and the agency was directly involved in its development, *Zuber v. Allen*, 396 U.S. 168, 192-93 (1969); *Udall v. Tallman*, 380 U.S. 1, 16 (1965); *Power Development Reactor Co. v. International Union of Electrical, Radio and Machine Workers*, 367 U.S. 396, 408 (1961). "The standard of judicial review is whether the agency interpretation was reasonable. It does not have to be the only reasonable construction or the interpretation that a court would choose if first presented with the question; it only must be a reasonable interpretation." *Columbia Basin Land Protection Association v. Schlesinger*, 643 F.2d 585, 600 (9th Cir. 1981), citing *Train v. Natural Resources Defense Council, Inc.*, 421 U.S. 60, 75 (1975); *Udall v. Tallman*, *supra*, 380 U.S. at 16; *Unemployment Compensation Commission v. Aragon*, 329 U.S. 143, 153-54 (1946).

Proper observance of these principles is particularly warranted under the circumstances here presented. BPA rendered continuous and substantial assistance to Congress in drafting and implementing this legislation, consulting on the Act's numerous technical provisions and preparing for contract negotiations subsequent to passage. This extraordinary administrative contribution to the development of a highly technical and complex statute was expressly acknowledged by Congress, *see* 125 Cong. Rec. S 11592 (daily ed. Aug. 3, 1979) (remarks of Sen. Hatfield) [Appendix C], 126 Cong. Rec. H. 9848-9 (daily ed. Sept. 29, 1980) (remarks of Rep. Dingell) [Appendix G]. Moreover, the contract provisions overturned by the Ninth Circuit were taken directly from the language of the Act, *see* Sections 3(17), 5(d)(1)(A), and from the three accompany-

ing Congressional reports.¹¹ BPA's interpretation of these provisions was consistent throughout the legislative process.¹²

Imposition of this heightened and improper review standard proceeds from the Ninth Circuit's fundamental misconception of the role assigned to preference rules under the Act. Congress chose to allocate power directly to both preference and nonpreference customers under long-term contracts, and retained the preference provisions of prior laws to govern administrative sale of all power not statutorily allocated. *See* Sections 5(a), 10(c). The preference rules thus retained have always been construed to govern administrative allocation of *uncommitted* power, which under the Act would include power that is "surplus" to BPA's statutorily-mandated contract obligations, *see* Section 5(f), and all power that BPA is authorized to sell following expiration of these initial mandated contracts.¹³ Preference rules have never been construed to condition Congress's latitude in allocating federal power by raising a presumption of preference customer entitlement that can be overcome only by "explicit statutory exception"—a requirement imposed here for the first time by the Ninth Circuit.

¹¹Paragraph 7(c) of the DSI contract [Appendix H]—the basic provision at issue here—was expressly ratified in and taken from the *House Interior Report*, at 48 [Appendix E, at E106-107]. This report language was provided to Congress by BPA on request, *see* Letter of BPA Administrator to Hon. Abraham B. Kazen (Aug 19, 1980), VIII Contract Official Record ("Record") 2334-51 [Appendix I], and was expressly deemed to represent the Senate's intent as well, 126 Cong. Rec. S 14691, S 14698 (daily ed. Nov. 19, 1980) (remarks of Senators Jackson and McClure) [Appendix J]. *See also House Commerce Report*, at 52, 61-2 [Appendix D, at D107, D122-D123]; *Senate Report*, at 23, 28, 59 [Appendix F, at F47-F48, F56-F57, F74].

¹²*See* Memorandum regarding "BPA Obligations With Respect To DSI Top Quartile," XXV Record 6748-50 (excerpting 1978 and 1979 BPA interpretations) [Appendix K].

¹³*See* pp. 21-23 *infra*.

That Congress enjoys complete discretion in crafting preference rules to suit particular allocation needs is evident from consideration of other statutes under which rights have been accorded to various classes of nonpreference customers without "explicit exception" to general statutory preference provisions.¹⁴ Indeed, no such "explicit exception" has been thought necessary, because the preference mechanism is simply inapplicable to power allocated directly by Congress. Previous decisions examining the scope of statutory preference rules have proceeded from a particularized analysis of relevant statutory provisions and have deferred to Congressional direction where interests other than preference have been protected. Thus, federal power marketing agencies are not required to sell power to preference customers when such sales would interfere with a primary purpose of the statute authorizing the federal project from which such power is derived, *Anaheim v. Duncan*, 658 F.2d 1326, 1330 (9th Cir. 1981); *Santa Clara v. Andrus*, 572 F.2d 660, 672 (9th Cir. 1978), *cert. denied sub nom. Pacific Gas & Electric Co. v. Santa Clara*, 439 U.S. 859 (1978); *Arizona Power Pooling Association v. Morton*, 527 F.2d 721, 727 (9th Cir. 1975), *cert. denied sub nom. Arizona Public Service Co. v. Arizona Power Pooling Association*, 425 U.S. 911 (1976), and are not required to breach valid

¹⁴For example, 16 U.S.C. §§ 837-837h grants BPA's nonpreference customers in the Northwest a statutory priority in power sales over BPA preference customers in the Southwest. The Hungry Horse Dam Act, 43 U.S.C. § 593a, grants nonpreference customers in Montana priority over preference customers in other states, and has twice been reaffirmed by statute. 16 U.S.C. § 837h; 16 U.S.C. § 839g(f). Congress also required that power from the Hanford New Production Reactor be divided equally between preference and nonpreference customer classes. Pub. L. 87-701, § 112e (Sept. 26, 1962), 76 Stat. 604 [Appendix Q]. The Niagara Power Project Act, 16 U.S.C. §§ 836-836a, reserves for preference customers only 50% of the power from the Niagara Project, and most of the remaining power is reserved for sale to nonpreference industrial customers. 16 U.S.C. §§ 836(b)(1)-(3). None of these laws repeals or creates an explicit exception to general statutory preference provisions.

power supply contracts with nonpreference customers, *Anaheim v. Kleppe*, 590 F.2d 285 (9th Cir. 1978).

Most strikingly, courts have rebuffed previous preference customer attempts to secure for themselves power otherwise statutorily authorized for sale to nonpreference industrial customers. In *Volunteer Electric Cooperative v. Tennessee Valley Authority*, 139 F. Supp. 22 (E.D. Tenn. 1954), *aff'd* 231 F.2d 446 (6th Cir. 1956), a preference customer of the Tennessee Valley Authority ("TVA") brought suit challenging TVA's sale of power directly to a nonpreference industrial customer. Plaintiff argued that TVA was obligated by statutory preference to sell this power to plaintiff for resale to nonpreference customers. In rejecting this claim, the court carefully noted that the statute expressly contemplates direct TVA sales to nonpreference industries in order to assure the highest possible load factors and revenue returns, thereby subsidizing domestic and rural power purchasers. Viewing preference in this particular legislative context, the Court stated in language applicable here:

The provisions cited are not conflicting so as to vitiate the effectiveness of one as opposed to the other. In fact they are in complete harmony. The policy voiced by the statute empowering defendant to sell direct to industry and pass on to members of the preferred classes the benefits derived thereby are salutary and in furtherance of the avowed intent of the preceding section. . . . As defendant points out, through the years the earnings realized from such direct sales have been reflected in lower wholesale rates to distributors such as plaintiff with a resulting saving to the ultimate consumer. . . . The position sought by plaintiff would actually circumvent the true intent of Congress that the cost of power to domestic and rural users be kept at the lowest possible rates. Instead, the result would be the enrichment of a small class of distributors such as plaintiff. *Id.*, at 26.

This analysis stands in sharp contrast to the presumption of entitlement accorded preference interests by the Ninth Circuit. As respects both BPA and TVA, statutory structure and history plainly reveal an intention to assure the availability of power for sale to nonpreference industrial customers, notwithstanding the operation of general statutory preference provisions. However, as the Ninth Circuit itself recognizes, 686 F.2d 708, 715 n.9, the results reached by the two courts in interpreting this common Congressional mandate stand in irreconcilable conflict.

Indeed, if the Ninth Circuit's view of statutory preference were sound, the Act would have been entirely unnecessary. Under the Court's reading, Sections 5(a) and 10 (c) would retain inviolate pre-existing preference customer entitlements to power, notwithstanding Congress's express allocation of power to nonpreference customers under initial 20-year contracts. The perceived inadequacy of traditional preference arrangements in governing the allocation of BPA power was the very reason for Congressional action in the first instance. Given a projected insufficiency of power to meet demand, simple operation of preference rules would have resulted in the denial of federal power to whole classes of nonpreference customers, utilities and industries alike. Congress intervened to accomplish precisely what preference could not: an appropriate and equitable allocation of federal power among all regional customers. The contrary meaning accorded preference under the Opinion turns back the clock and renders nugatory the Act's very purpose.

2. The Opinion Overturns Congress's Plan Which Allocates Power to Nonpreference Industrial Customers While Reaffirming Preference Customer Rights to All Unallocated Power.

Resolution of this case turns on a single issue of statutory construction: what are the circumstances under which BPA may restrict deliveries of a portion of DSI power for

supply to other customers? BPA interpreted the Act as having allocated this portion of power to the DSIs, Section 5(d)(1)(B), and having protected that allocation from preference customer challenge, Section 5(g)(7); accordingly, BPA incorporated in DSI contracts provisions allowing restriction of this power only for the reserve purposes specified in Sections 3(17) and 5(d)(1)(A). The Ninth Circuit, on the other hand, found no such statutory allocation to the DSIs, and therefore held this portion of power subject to preference customer claims under the Act's general preference provisions, Sections 5(a) and 10(c).

The premise upon which the Opinion rests is flatly wrong. Section 5 of the Act sets forth an integrated plan for allocating power to each BPA customer class—including the DSIs—and obligates BPA promptly to offer, negotiate, and execute initial 20-year supply contracts with all such customers. This allocation plan was considered by Congress to be “the heart of the regionally-negotiated ‘peace’ settlement.” 126 Cong. Rec. H 9864 (daily ed. Sept. 29, 1980) (remarks of Rep. Foley) [Appendix G].

Section 5(d) prescribes the “amount of power” to be supplied the DSIs and the manner in which such loads are to be served. Section 5(d)(1)(B) requires BPA to offer each DSI an initial long-term power sales contract for “an amount of power equivalent to that to which such customer is entitled under its contract dated January or April 1975 providing for the sale of ‘industrial firm power.’” “Amount of power” is a commercial term used in federal power marketing contracts with industrial customers, and refers to the size of the customer's full contract load as measured in kilowatts. *See* DSI Contract (1975), § 4 [Appendix N]. Thus, Section 5(d)(1)(B) allocates to each DSI the same full load of power to which it was entitled under its pre-Act contract.

Section 5(d)(1)(A) directs that BPA retain rights to restrict deliveries of a portion of this power where neces-

sary to provide reserves for BPA's "firm power loads."¹⁵ In defining these restriction rights, BPA divides the DSIs' contract load into quartiles. BPA plans "firm" power resources to serve three quartiles of this load, and plans to serve one quartile—the "top quartile"—primarily with "nonfirm" power. It is the DSIs' top quartile that is most subject to restriction under Section 5(d)(1)(A).¹⁶

Use of nonfirm power to serve the DSIs' top quartile allows BPA to achieve certain operating efficiencies that produce the reserve/revenue advantages of DSI service intended by Congress.¹⁷ However, regardless of the kind of power used by BPA in serving DSI loads it is clear under

¹⁵"Firm" power refers to hydro power whose annual production is assured even if streamflows do not exceed their historically-worst ("critical") level. "Nonfirm" power refers to hydro power whose annual production is contingent upon the availability of above-critical streamflows. "Firm loads" are those loads for which BPA is obligated to provide continuous service, and which therefore are supported with firm power resources. All of BPA's power sales obligations to utility customers are "firm load obligations." This means that BPA has planned sufficient firm resources to serve Respondent utility customers' requirements, and that the nonfirm power here at issue is not needed to serve those requirements, absent emergency shortages.

¹⁶Under the Act and the new DSI contracts, BPA's right to restrict power deliveries to the DSIs' second quartile has been significantly expanded. *See, e.g., House Interior Report*, at 48 [Appendix E, at E106-E107]; DSI Contract (1981), § 7(d) [Appendix H]. While these second quartile restriction rights are not at issue here, it is important to note that in entering new contracts under the Act the DSIs surrendered significant rights enjoyed under their pre-Act contracts, with the understanding that no portion of their allocated loads would be restricted except when necessary to protect BPA's firm load obligations. *See Statement of Jack A. Speer before the House Subcom. on Water and Power Resources [Appendix O].*

¹⁷Use of nonfirm power when available to serve the DSIs' top quartile maximizes efficient operation of System resources by enabling BPA to meet its Section 5(d)(1)(B) supply obligations to the DSIs without acquiring additional costly generating plants. Because the DSIs pay the same premium rates for nonfirm service

Section 5(d)(1)(B) that the DSIs have been allocated by Congress an "amount of power" sufficient to meet their full loads, which power may not be restricted except for the specific reserve purposes set forth in Section 5(d)(1)(A).

Section 5(b) prescribes the power to which all utilities are entitled, including both preference (publicly-owned) and nonpreference (privately-owned) utilities. It obligates BPA to meet the *net* power requirements—and only the net power requirements—of all utility customers. These net power requirements refer to the power needed by the utilities from BPA in order to assure full service to their consumers. Thus, for the vast majority of non-generating utilities which do not produce any power of their own, Section 5(b) obligates BPA to supply *all* the power necessary to meet their consumer demands. However, for those few generating utilities which do produce power, Section 5(b) obligates BPA to supply only the net *additional* power necessary to assure full service to their consumers; under Section 5(b)(1), generating utilities are obligated to use the power that they themselves produce to supply their own consumers.

Under Section 5(f), power that remains *after* BPA has satisfied its Section 5(b), (c), and (d) contract obligations to all customers is "surplus" that may be sold in accordance with statutory preference rules. Thus, the Act makes clear that power directly allocated to the DSIs under Section 5(d)(1)(B) is not subject to claim by preference customers as "surplus."

Section 5(g)(7) of the Act provides that "[t]he Administrator shall be deemed to have sufficient resources for the

that they pay for firm service, this arrangement reduces rates for all other BPA customers by returning to BPA four quartiles of "firm service revenues" for only three quartiles of "firm service costs." These significant regional benefits accrue only because industrial customers are uniquely capable of operating their top quartile subject to the annual availability of nonfirm power. See Letter of BPA Administrator to Hon. Abraham B. Kazen (Aug. 19, 1980), VIII Record 2334-51 [Appendix I].

purposes of entering into the initial contracts specified [for all customers]." Through this provision Congress removed the indispensable element of all preference claims—insufficient power to enter into contracts with both preference and nonpreference customers, *see, e.g., Santa Clara v. Andrus, supra*, 572 F.2d at 660; *Arizona Power Pooling Assn. v. Morton, supra*, 527 F.2d at 721. The express purpose of Section 5(g)(7) was to immunize these statutorily-mandated nonpreference customer contracts from preference customer challenge during their 20-year terms, thus providing a period of regional calm while BPA exercises its new authority under Section 6 of the Act to acquire sufficient power for all customers. Following expiration of these initial contracts BPA will be obligated to possess power *actually* sufficient to support any future contracts with nonpreference customers, which contracts thus are made subject to the Act's preference provisions.¹⁸

¹⁸The purpose and significance of Section 5(g)(7) were discussed at length in the legislative history. Congressman Foley of Washington, a leading sponsor of the bill, stated at the time of House passage:

It is said that this bill will not prevent litigation. That is certainly true. There may be litigation over rates, over new resources, and over the meaning of many provisions that have been added to the bill largely in order to reassure the bill's critics. But the key point is that litigation under this bill will not include litigation to determine the validity of each entity's new power supply contract.

On the contrary, by stating that BPA shall be "deemed" to have sufficient power to enter into all the 20-year power sales contracts mandated by the legislation, the bill specifically ensures that these new contracts will be valid against legal challenge. This provision does not "guarantee" actual power deliveries in day-to-day operation, but it does guarantee that whatever litigation occurs on power matters will not be litigation going to the heart of any BPA customer's power sales contract and power allocation—the most important single result of this legislation. 126 Cong. Rec. H 10678 (daily ed. November 17, 1980) (remarks of Rep. Foley) [Appendix L].

Sections 5(a) and 10(c) reaffirm and retain prior statutory preference rules governing the administrative allocation of uncommitted power. As indicated, these preference rules are only operable in the absence of direct Congressional intervention; nothing in the language or history of Sections 5(a) and 10(c) suggests that preference customers are entitled to power that has been statutorily allocated to the DSIs.¹⁹

Congress's reaffirmation of preference in Sections 5(a) and 10(c) of the Act thus can be harmonized with its protection of nonpreference customer contracts in Section 5(g) (7): only *initial* mandated power contracts, and only the *full amount of power* allocated in those contracts, are protected.²⁰ Sales of "surplus" power and all sales of power under future contracts are governed by the statutory preference rules expressly retained in the Act.²¹

See House Commerce Report, at 37, 64 [Appendix D, at D82, D126-D127] ["Section 5(g)(7) is intended to ensure that a challenge (on the basis that the Administrator lacks legal authority on account of insufficient power resources) to the initial contracts required to be offered under this Act will not be sustained."].

¹⁹Section 5(a) retains and reaffirms the preference clause of the Bonneville Project Act, while Section 10(c) is a savings clause for "other Federal laws" that accord preference and priority to publicly-owned utilities and cooperatives. Section 10(c) was enacted expressly for the purpose of reassuring preference customers in other regions of the United States who feared that the Act—by mandating contracts for and allocating power directly to nonpreference customers—would weaken their rights under federal power marketing statutes applicable to them. *See, e.g., House Commerce Report*, at 34 [Appendix D, at D78].

²⁰The Section 5(g)(7) "deemed sufficient" language was added to the Act by the Senate Energy and Natural Resources Committee at the same time as Sections 5(a) and 10(c), *see generally Senate Report*, at 5 [§ 5(c)(1)], 12 [§ 9(c)(2)] [Appendix F, at F12, F28], expressly to protect the mandated DSI contracts in the face of these preference provisions.

²¹As BPA stated in its letter offering the new mandated DSI contracts here at issue [Appendix M]:

Pursuant to this statutory plan BPA promptly negotiated initial long-term power supply contracts with each mandated customer class. Paragraph 7(c) of the DSI contracts [Appendix H] implements Section 5(d)(1)(A) by providing that DSI power deliveries may be restricted "in amounts up to 25 percent of the Purchaser's Operating Demand, at any time and for any reason in order to protect Bonneville's ability to meet its Firm Obligations." Paragraph 7(c) thus permits BPA to restrict DSI top quartile deliveries where necessary—but only where necessary—to provide reserves for firm load obligations, including Section 5(b) net power requirement obligations to utility customers; it does not permit such restrictions to supply preference utility customers with power that is in *excess* of their net power requirements and that will simply be resold at higher prices to entities other than their own consumers.²² It is this limitation on the purposes for which DSI

This contract is the initial contract that Bonneville is required to offer each Industrial Purchaser pursuant to sections 5(d)(1)(B) and 5(g) of the Regional Act. As you know, the Act contemplates in section 5(d)(1) [A] additional, future contracts with each existing Industrial Purchaser, but unlike this initial contract, such future contracts do not have the benefit of the statutorily deemed sufficiency of power available to the Administrator under section 5(g)(7). Bonneville's ability to offer any future contracts to its nonpreference customers, including the Industrial Purchasers, is therefore largely dependent upon Bonneville achieving firm load/resource balance while these initial contracts are in effect.

²²Respondent utilities argued below that the nonfirm power here in dispute might be needed to serve their consumers in the event that their own power plants fail to meet planned output. This option, however, is specifically precluded by the Act and by the Pacific Northwest Coordination Agreement, under which Respondents must assure the production of power from their own resources. BPA has never provided nor been obligated to provide reserves for the protection of utility-owned resources against possible failure; it maintains reserves only to assure its own statutory and contractual supply obligations. See Section 5(b)(1); Bonneville Power Administration, U.S. Dept. of Interior, *Draft Environmental Statement* (DES-77-21) II-71 (July 22, 1977) [Appendix P].

loads may be restricted that was challenged by the preference utilities and struck down by the Ninth Circuit.²³

Proceeding from the premise that Congress did not allocate nonfirm power to the DSIs, the Opinion concludes that BPA is obligated by the Act's preference provisions to make this power available to Respondent preference utilities at their election, and not simply for the limited reserve purposes set forth in Section 5(d)(1)(A). 686 F.2d 708, 712. This erroneous conclusion flows from the Court's failure to understand that Congress (i) allocated the DSIs under Section 5(d)(1)(B) a specific "amount of power," and (ii) limited under Section 5(d)(1)(A) BPA's pre-Act rights to restrict DSI power deliveries.

In its amended Opinion, the Court noted that Section 5(d)(1)(B) "expressly links the DSIs' present allocation to their entitlement under the 1975 contracts. It is undisputed that under the 1975 contracts the DSIs received nonfirm power only after the preference customers filled their nonfirm needs." 686 F.2d 708, 712 n.4. Contrary to the Court's assertion, Section 5(d)(1)(B) does *not* link the DSIs' present allocation to their "entitlement" under 1975 contracts; rather, it links only the "amount of power" allocated the DSIs under the Act to the "amount of power" allocated under their pre-Act 1975 contracts. It is this "amount of power"—sufficient to serve the full four quartiles of DSI loads—that was specifically protected from preference customer challenge by Section 5(g)(7).

It is true that under the DSIs' 1975 contracts BPA was authorized to restrict top quartile power deliveries for supply to preference customers "at any time," DSI Contract (1975), General Contract Provisions § 8(b) [Appendix

²³Respondents actually challenged four separate contract provisions, all relating to and implementing paragraph 7(c) restriction rights. The decision of the Ninth Circuit extends to all four DSI contract provisions.

N.]²⁴ However, these restriction rights were sharply limited by the Act, and Sections 3(17) and 5(d)(1)(A) now authorize BPA to restrict top quartile deliveries only "to avert particular planning or operating *shortages*, for the benefit of *firm* power customers," that is, to protect "firm power loads." (Emphasis supplied.) See *Senate Report*, at 23 [Appendix F, at F47-F48] ("It is not intended [that BPA will restrict DSI power] to protect other than firm loads.")

The Ninth Circuit simply overlooked this fundamental change in BPA's restriction rights. The Opinion cannot be squared with either Section 5(d)(1)(B), which allocates to the DSIs an "amount of power" for their full loads, or Section 5(d)(1)(A), which expressly limits the purposes for which deliveries of this power may be restricted. Contrary to the assumption upon which the Opinion rests, no portion of the DSI load lacks an initial statutory allocation; BPA's right to restrict top quartile power deliveries for specified reserve purposes neither diminishes the protection from preference customer challenge afforded DSI contracts under Section 5(g)(7), nor renders top quartile deliveries subject to restriction for nonreserve purposes.

Nor does BPA's use of nonfirm power in serving the top quartile suggest that this portion of DSI load lacks an initial statutory allocation. The fact that nonfirm power is contingent upon annual streamflow conditions does not diminish BPA's statutory obligation to supply the full amount of the DSIs' top quartile when such power is available. Only after meeting this top quartile obligation may BPA sell any remaining nonfirm power to preference customers as "surplus" under Section 5(f).²⁵

BPA's interpretation of these statutory provisions—as explained to Congress and reflected in the DSI contracts—

²⁴In so doing, however, BPA was obligated to compensate the DSIs for the power diverted, see *House Commerce Report*, at 62-3 [Appendix D, at D124]. The sole reason for this compensation was that under their 1975 contracts the DSIs had been initially allocated an "amount of power" for their full loads.

²⁵The Court's conclusion that "nonfirm power is no less subject to the preference than firm power," 686 F.2d 708, 712, is com-

harmonizes the Act's simultaneous retention of general preference rules and conferral of specific nonpreference customer contract rights. It is basic to the canons of statutory construction that the Act's general preference provisions do not defeat the specific allocations of power to nonpreference customers. *See MacEvoy Co. v. United States*, 322 U.S. 102, 107 (1944) ("However inclusive may be the general language of a statute, it 'will not be held to apply to a matter specifically dealt with in another part of the enactment.'"). The Ninth Circuit's simplistic "preference analysis" ignores a key Congressional goal of assuring power for nonpreference customers, and destroys the complex statutory plan by which that goal was to be achieved.²⁶

3. The Opinion Directly Impairs BPA's Ability to Secure the Reserve/Revenue Advantages of Industrial Customer Service Intended by Congress.

Congress and BPA spent four years refining the mechanics of industrial customer service under the Act. That service was designed to reduce costs for all regional customers by providing BPA with specific operating efficiencies and additional revenues. In destroying the reserve/revenue advantages of DSI service so fundamental to the Act's economic and environmental viability, the Opinion leaves regional power actors facing renewed uncertainty and the prospect of extended litigation.

pletely irrelevant. Preference rules govern BPA's allocation of *all* power—firm and nonfirm—that has not already been committed by Congress. The nonfirm power here in dispute is used by BPA in meeting its Section 5(d)(1)(B) power supply obligations to the DSIs; therefore, this power has been allocated by statute, not by preference.

²⁶The Opinion states that "the Act and its preference clause are best served by an interpretation that ensures the sale of power to preference customers." 686 F.2d 708, 715. On the contrary, they are best served by an interpretation that ensures the sale of power as Congress intended. The Opinion neglects the most basic canons of statutory construction by failing even to consider Congress's express purpose of ensuring continued sales of BPA power to nonpreference customers. *See, e.g., House Commerce Report*, at 36-37 [Appendix D, at D80-D82].

Congress expressly sought to capitalize on the unique features of BPA's hydro system and the operating characteristics of DSI loads to provide regional reserves and meet all customer contract requirements at minimal costs. *See, e.g., Senate Report*, at 59 [Appendix F, at F74]; Letter of BPA Administrator to Hon. Abraham B. Kazen, VIII Record 2334-51 [Appendix I]; "BPA Obligations With Respect To DSI Top Quartile," XXV Record 6748-50 [Appendix K]. Under the Opinion, BPA will be forced to sell to a small group of preference utilities certain power that it had planned to use for DSI service in securing these interests. This power will be sold at lower rates than would have been paid by the DSIs to whom it was statutorily allocated. In addition, BPA may not be able to meet its statutory supply obligations to the DSIs or assure the availability of regional reserves without acquiring additional firm generating resources at significant economic and environmental costs. As the Ninth Circuit itself acknowledges, 686 F.2d 708, 715, under the Opinion BPA's revenues will be reduced and the rates paid by all other regional customers accordingly increased.²⁷

²⁷In limiting BPA's use of nonfirm power to serve the DSIs' top quartile, the Opinion leaves BPA unable to recoup four quartiles of DSI power sales revenues while incurring only three quartiles of firm power costs. *See n. 17 supra*. Under the Act's rate provisions it is essential that BPA receive this extra revenue in order to make possible an extension of the Act's rate subsidy for residential consumers of nonpreference utilities beyond 1985 without imposing additional costs on consumers served by non-generating preference utilities. The importance of DSI service in effectuating the Act's rate provisions is evident from the detailed narrative and computer analyses reprinted in the *Senate Report* and supplied in the letter of the BPA Administrator to the Hon. Abraham B. Kazen, chairman of a key House subcommittee. *See Senate Report*, at 56-79 [Appendix F, at F69-F84]; Letter of BPA Administrator to Hon. Abraham B. Kazen, VIII Record 2340 [Appendix I] (BPA's ability to serve DSIs with nonfirm power "is one reason why, from a rate impact standpoint, it is beneficial for other consumers that the DSIs are part of the regional power system in the Northwest.").

More particularly, the Opinion seriously jeopardizes continued DSI operations in the Northwest. The domestic aluminum industry presently is suffering a devastating recession. DSI rates have quadrupled in the past two years, eliminating the original cost advantages of Northwest aluminum production. Now, under the Opinion, the DSIs also face significant power delivery restrictions in excess of those authorized by the Act—an unfavorable quality of service compared with that available in other regions of the United States and abroad. As a result, Northwest producers may be forced to close their plants in favor of less costly and more secure operations elsewhere, thereby triggering significant revenue losses for BPA and the regional economy.

The immediate effect of the Ninth Circuit's decision will be to allow a small group of preference utilities which own and operate their own generating resources to substitute federal power—otherwise allocated to the DSIs—for the power that they themselves produce and are statutorily obligated to use in supplying their own consumers. These few utilities in turn will be enabled to sell their own power—now “displaced” with the DSIs' nonfirm power—at higher prices to other utilities and to the DSIs themselves.²⁸ Congress and BPA understood the windfall that would accrue to these few generating utilities if allowed to divert industrial customer loads for resale pur-

²⁸Only those few large utilities operating their own generating facilities are able commercially to exploit the power diverted from industrial customer loads because they alone produce power capable of being “displaced” with this federal power and resold. The Ninth Circuit's failure to appreciate this displacement capability—and the potential for windfall gain made possible thereby—leads to its simple and incorrect conclusion that “[h]ere, the preference customers want the low-cost power for their customers.” 686 F.2d 708, 715 n.9. As discussed, under the Act and the Pacific Northwest Coordination Agreement, Respondent utilities are not entitled to rely on this power to support their own generating resources. See n.22 *supra*.

poses, and expressly prohibited restriction of DSI deliveries except where necessary to serve important *regional* reserve interests. The Opinion thus makes possible under the Act precisely what was prohibited by the Sixth Circuit under the TVA Act: the enrichment of a small group of preference utilities at the expense of all other regional power users. See *Volunteer Electric Cooperative v. Tennessee Valley Authority*, *supra*, 139 F.Supp. 22.

In sum, the Ninth Circuit's decision is wrong—plainly wrong. BPA's implementation of the Act through contract provisions expressly described to Congress during the legislative process and in precise accordance with statutory directives must be deemed "reasonable" under any measure of that review standard. The contrary ruling imposed here emanates from an unarticulated standard of review under which the court has substituted its own policy views for those of Congress. The decision below imposes consequences of enormous importance to the future of regional power planning legislation and Pacific Northwest power supplies, thus warranting review and reversal.

CONCLUSION

For these reasons a writ of certiorari should issue to review the judgment and Opinion of the Ninth Circuit.

Dated: December 22, 1982

Respectfully submitted,

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Appendix A

CENTRAL LINCOLN PEOPLES' [708]
UTILITY DISTRICT, et al., Petitioners,

Public Power Council, et al.,
Petitioner-Intervenors,

v.

Peter JOHNSON, as Administrator of the Bonneville
Power Administration, Department of Energy, et al.,
Respondents,

Aluminum Company of America, et al.,
Respondent-Intervenors.

No. 81-7561.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Jan. 6, 1982.

Decided April 6, 1982.

As Amended Sept. 7, 1982.

Rehearing and Rehearing En Banc
Denied Sept. 27, 1982.

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OPINION [709]

BOOCHEVER, Circuit Judge:

This case concerns the allocation of power under the newly enacted Pacific Northwest Electric Power Planning and Conservation Act, Pub.L.No.96-501, 94 Stat. 2697 (1980) (the Act). Public utility customers of the Bonneville Power Administration (BPA) contend that the power contracts offered to BPA's industrial customers violate those provisions of the Act that give preference to public utilities in the allocation of power. Because we find no explicit exception to the [710] unambiguous provisions of the Act that preserve the longstanding preference given to public utilities, we find the contracts invalid.

FACTS

BPA is the federal agency that markets federal hydro-electric power in the Pacific Northwest. Congress passed the Act to resolve competing claims to low-cost federal power. *See, e.g.,* H.R.Rep.No. 976 (Part II), 96th Cong. 2d Sess. 26 (1980) U.S.Code Cong. & Admin.News 1981, pp. 10052, 10113. The Act requires BPA to offer long-term contracts to all of its customers. BPA offered contracts to its direct service industrial customers (DSIs) on August 28, 1981. These contracts are the first to be offered under the Act and the first to be adjudicated.

BPA provides DSIs "Industrial Firm Power" which allows BPA to restrict its delivery of power to the DSIs for specified reasons. Each quartile, or fourth, of the DSI power is subject to different restrictions. The first quartile is served partially with nonfirm energy, the energy remaining after BPA has fulfilled its firm obligations. Nonfirm energy is the energy in excess of that which BPA can reliably plan on producing and is therefore provided only when **such an excess exists.**¹ Firm energy is the energy that BPA can reliably plan on producing and must be sufficient to serve BPA's firm loads. Firm loads are the power requirements that BPA must plan for and may not restrict.

Prior to the Act, BPA offered nonfirm energy first to the preference customers and then to the DSIs. Under the new contracts, BPA plans to offer nonfirm energy to the

¹BPA plans its future power resources on the assumption that during some periods the water levels used to generate power will be low or "critical." BPA plans on having at least the amount of power that it can produce at a critical water level and that power is therefore firm power. When the water level is greater than critical, the power generated from the excess water is nonfirm energy.

DSIs first. The preference customers challenge the contract provisions that effectuate this new method of allocation.³

ANALYSIS

I.

Applicable Standards

Section 9(e)(5) of the Act provides that suits to challenge final actions such as contract offers shall be brought in the United States Court of Appeals for the region. The original jurisdiction given this court by § 9(e)(5) raises procedural problems that will have to be resolved on a case-by-case basis. Because no factfinding is necessary in this case, we will treat it like a petition for administrative review. A myriad of variations may arise in suits brought under the Act, and we do not intend to bind the court to the procedures used in this case.

Section 9(e)(2) of the Act provides that the scope of review by this court of a sale of electric power is governed by the Administrative Procedure Act, 5 U.S.C. § 706. The Administrative Procedure Act specifies that in reviewing agency actions, a court shall decide all relevant questions of law, interpret statutory provisions, and determine the applicability of the statutory terms to agency action. The reviewing court must set aside agency actions that are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. *Id.* § 706(2)(A).

³Four provisions in the contracts effectuate this interpretation. Section 7(c) provides that sales will be made to the first quartile prior to other sales of nonfirm energy. Section 7(e) provides that the adjustments for energy already used by the first quartile may not be made for sales of nonfirm energy to preference customers. Section 8(a)(2) provides that BPA will not sell nonfirm energy if it can be used for the first quartile. Section 8(c)(9) provides that BPA will attempt to acquire additional energy before requiring DSIs to repay energy advanced to the first quartile.

[1, 2] In interpreting the Act, we give substantial deference to BPA's construction of the statute because BPA is the agency charged with the Act's administration. *United States v. Rutherford*, 442 U.S. 544, 553, 99 S.Ct. 2470, 2475, 61 L.Ed.2d 68 [711] (1979). This deference is especially appropriate because BPA's interpretation is a contemporaneous construction of a statute by those with the responsibility for setting it in motion. *Udall v. Tallman*, 380 U.S. 1, 16, 85 S.Ct. 792, 801, 13 L.Ed.2d 616 (1965); *Columbia Basin Land Protection Association v. Schlesinger*, 643 F.2d 585, 600 (9th Cir. 1981). Additional weight is given the agency interpretation when the agency administrators participated in drafting the legislation as they did here. *Zuber v. Allen*, 396 U.S. 168, 192, 90 S.Ct. 314, 327, 24 L.Ed.2d 345 (1969). Our review is limited to whether BPA's interpretation of the Act is reasonable. *Columbia Basin*, 643 F.2d at 600. Only if BPA's interpretation is unreasonable may we conclude that BPA's contract offers violate the Act.

II.

The Preference

Giving all due deference to BPA's construction of the Act, we nevertheless find its interpretation unreasonable. We find that the explicit and longstanding preference retained in the Act controls rather than the ambiguous provisions relied upon by BPA to justify a change. Before examining the Act's legislative history and underlying purposes, we turn first to the express terms of the Act.

A. Pertinent statutory provisions

1. Preference provisions: Section 5(a) of the Act provides that:

All power sales under this Act shall be subject at all times to the preference and priority provisions of the Bonneville Project Act of 1937. . . .

At § 10(c), the Act further provides that:

Nothing in this Act shall alter, diminish, abridge, or otherwise affect the provisions of other Federal laws by which public bodies and cooperatives are entitled to preference and priority in the sale of federally generated electric power.

The Bonneville Project Act, 16 U.S.C. § 832 *et seq.*, requires that BPA give preference and priority to public bodies and cooperatives in selling power. 16 U.S.C. § 832c (a). Thus, §§ 5(a) and 10(c) of the Act explicitly reaffirm the preference to public bodies established by the Bonneville Project Act.

Preference provisions have been included in federal power acts since 1906. Fereday, *The Meaning of the Preference Clause in Hydroelectric Power Allocation under the Federal Reclamation Statutes*, 9 Env't'l L. 601, 610 (1979). BPA's allocation of power has been subject to the preference since the Bonneville Project Act was passed in 1937. It is undisputed in this case that BPA previously interpreted the preference provision to apply to nonfirm power as well as firm power. Thus, prior to offering the contracts now at issue, BPA allocated nonfirm power according to the preference after it had first allocated firm power according to the preference. BPA's pre-Act interpretation of the preference was consistent with this court's interpretation of a preference clause under an analogous statute. See *Arizona Power Pooling Association v. Morton*, 527 F.2d 721, 725 (9th Cir. 1975), *cert. denied*, 425 U.S. 911, 96 S.Ct. 1506, 47 L.Ed. 2d 761 (1976) (holding that a similar preference clause in the Reclamation Project Act of 1939, 43 U.S.C. § 485h(c), applied to sales of thermally generated electrical power).

Any modification of the preference, in view of its long history and clear reaffirmation in the Act, should be explicit. See generally *New England Power Co. v. New Hampshire*, U.S., 102 S.Ct. 1096, 1102, 71 L.Ed.2d 188 (1982) (courts "have no authority to rewrite . . . legislation based

on mere speculation as to what Congress 'probably had in mind' ").

2. Basis for BPA's interpretation: BPA's interpretation is based on the assumption that § 5(d)(1)(A) of the Act requires giving the DSIs priority to nonfirm energy for their first quartile. Subsection 5(d)(1)(A) provides that:

The Administrator is authorized to sell in accordance with this subsection electric power to existing direct service industrial customers. *Such sales shall provide a portion of the Administrator's reserves [712] for firm power loads within the region.* (emphasis added).

Section 3(17) of the Act defines "reserves" as the power needed to avert shortages for the benefit of firm power customers.³ To evaluate the BPA's conclusion, it is first necessary to consider the manner in which nonfirm energy is initially allocated.

The sale of nonfirm energy is contingent on availability. When sufficient nonfirm power is available, BPA provides it as needed to both the preference customers and DSIs. When, however, there is insufficient nonfirm energy to fill the needs of both types of users, the preference clause appears on its face to mandate, and, as previously interpreted by the BPA, did require, that the nonfirm energy needs of the preference customers be met before the nonfirm needs of the DSIs. Application of the preference in this manner interrupts the flow of nonfirm power to the DSIs. BPA and the DSIs argue that this process violates § 5(d)(1)(A) because it makes the DSIs' nonfirm power a reserve for the preference customers' nonfirm needs.

³BPA contracts to provide the DSIs with power. If, however, a power plant outage occurs or energy use peaks, for example, so that BPA could not meet its firm obligations, BPA would interrupt its service to the DSIs and use the power then available to serve its other loads. In this way, the power allocated to the DSIs serves as a reserve.

[3] The BPA and DSIs' reasoning is flawed. Although applying the preference may deprive the DSIs of nonfirm power, that does not constitute using reserves for nonfirm loads. This so-called interruption results from insufficient energy to make the initial allocation of nonfirm power to the DSIs, not from the use of energy already allocated to the reserve. It is meaningless to speak of interrupting the flow of power that has not yet been allocated. No customer has an expectation of receiving any nonfirm power until BPA allocates it. The power allocated to the DSIs' first quartile serves as a reserve for firm loads because it may be interrupted on a few moments notice if, for example, the demand for firm power peaks. *See* note 3, *supra*. It is a non sequitur to conclude from the fact that the reserve cannot be used for nonfirm needs that the nonfirm energy cannot initially be allocated to the preference customers in accordance with the preference.⁴

The only reasonable interpretation of § 5(d)(1)(A) that is consistent with the preference is that the initial allocation of nonfirm power is no less subject to the preference than firm power. Nonfirm power does not become part of the reserve in the DSI load unless there is nonfirm power in excess of the amounts needed by the preference customers. When there is no surplus over the amount needed by the preference customers there can be no provision to the DSIs and, thus, no reserve created. When, however, there is suf-

⁴We find no support for the contention that § 5(d)(1)(B) guarantees the nonfirm power needed to serve the DSIs' first quartile. Section 5(d)(1)(B) expressly links the DSIs' present allocation to their entitlement under the 1975 contracts. It is undisputed that under the 1975 contracts the DSIs received nonfirm power only after the preference customers filled their nonfirm needs. Thus, subsection (B) does not entitle the DSIs to nonfirm power for the first quartile under the contracts now at issue. Moreover, § 5(g)(7) does not alter this conclusion because it does not grant the DSIs any greater entitlement than what they received under the 1975 contracts.

ficient energy to provide nonfirm power to both the preference customers and DSIs, the non-firm power allocated to the DSIs becomes a reserve for firm loads. If, for example, a preference customer's firm load peaked above BPA's firm power resources so that BPA's obligation exceeded its ability to furnish firm power, BPA would meet the peak demands with energy from DSI's reserves. This straightforward construction is preferable because it harmonizes what would otherwise be conflicting provisions of the Act. *See generally Erlenbaugh v. United States*, 409 U.S. 239, 244, 245, 93 S.Ct. 477, 480, 481, 34 L.Ed.2d 446 (1972); *Clark v. Uebersee Finanz-Korp.*, 332 U.S. 480, 488-89, 68 S.Ct. 174, 177-78, 92 L.Ed. 88 (1947).

Moreover, even if § 5(d)(1)(A) could be construed as creating an exception to the [713] preference, BPA's interpretation is unreasonable given the clear preference provisions to the contrary. Section 5(d)(1)(A) specifies only that the reserve shall be used for firm power loads: it says nothing about the provision of nonfirm energy. To accept BPA's interpretation, we would have to infer that the interruption of the DSI nonfirm power that would result from the application of the preference when there is insufficient power for all users is equivalent to using reserves for non-firm loads. We would also have to infer that any allocation of nonfirm power that might interrupt the flow of nonfirm power to the DSIs is not subject to the preference. It is unreasonable to assume that Congress intended to create such a significant exception to the preference through the indirect device of a provision referring to reserves.⁵ We dis-

⁵BPA and the DSIs argue that BPA informed Congress of its proposed interpretation of the Act while the Act was still pending and that, in passing the legislation, Congress accepted BPA's interpretation. We rejected a similar argument in *Arizona Power Pooling, supra*, where the agency authorized to allocate federal power argued that Congress had indirectly "approved" an exception to the preference through actions it had taken in regard to annual appropriations for the project at issue in that case. Although it was undis-

cern no basis in the explicit preference provisions of the Act for differentiating between the preference accorded nonfirm and firm power. We believe that if Congress had intended to override its twice-expressed and explicit preference mandate it would have spoken more directly.

Although the language of the Act appears clear, and thus controlling, we briefly examine the Act's history and purpose to see if they are consistent with what appears, on the Act's face, to be Congress' clear intent.

B. Legislative History

The legislative history does not provide clear support for either side. Thus, although the preference to public utilities is explicitly recognized,⁶ we acknowledge that there are also

puted that Congress had taken certain actions in passing appropriations that supported the agency's decision not to sell interim power to a preference customer, this court concluded that:

[t]his fact in and of itself does not justify the inference of congressional approval of purchase negotiations that were allegedly conducted in violation of the preference clause.

527 F.2d at 726. The court went on to note that nothing in the record or legislative history indicated that Congress was aware that its actions on appropriations would be construed to affect preference rights. *Id.*

Similarly, in the present case, there is no more indication that Congress was aware that BPA's interpretation would create an exception to the preference than there is that Congress intended to create such an exception through the indirect device of the reserve provision. Precise knowledge of the agency position is necessary to a finding that Congress ratified it. *Id.*

⁶The House Committee of Interior and Insular Affairs stated in its Report "it is not, however, a purpose to interfere in any way with, or modify the statutory rights of preference customers either within or without the region." H.R.Rep.No.976 (Part II), *supra*, at 26, U.S. Code Cong. & Admin.News at p. 10114. See also *Id.* at 34. The House Committee on Interstate and Foreign Commerce responded in its report to concerns that the Act would change the

statements supporting BPA's interpretation.' It is unfortunate that the [714] legislative history fails to give a clearer indication of Congressional intent. The inconsistent character of the legislative history is reflected several places in the Act, leading inevitably to burdensome resort to the courts for interpretation.

C. Purpose of the Act

Congress intended to achieve several purposes in the Act. It primarily intended to determine how federal power should be allocated and to give BPA authority to acquire power resources. *See, e.g.,* H.R.Rep.No.976 (Part I), *supra*, at 27. In its allocation of power, Congress clearly mani-

meaning or applications of the preference. It stated that it did not want to undo nearly 80 years of history and that specific provisions were designed to protect the entitlement of preference customers to the full Federal base system. H.R.Rep.No.976 (Part I), *supra*, at 26.

'Support for BPA's position can be found in Part II of the Report. It states that:

Approximately 25 percent of the DSI load is to be treated as a firm load for purposes of resource operation . . .

H.R.Rep.No.976 (Part II), *supra*, at 48, U.S. Code Cong. & Admin. News at p. 10136. The quartile referred to is the first quartile. Appendix B to the Senate Report provides that the first quartile:

would be served with resources which are in excess of critical planning amounts but operated to meet the entire DSI load as if it were firm.

S.Rep.No.272, 96th Cong. 2d Sess. 59 (1980). The following sentence in the appendix to the Senate Report, however, indicates the ambiguity in Congress' direction to treat the first quartile as firm. It provides:

The operation of the System to carry out this purpose results from treating as a firm load the maximum amount of the DSI load (not all of which can be covered under critical streamflow planning), to the extent that this maximum load can be met in the initial period of the PNW Coordination Agreement Critical Period while protecting firm loads against the worst historical streamflow and maintaining an ability to restrict an

fested its intention to retain the preference clause. *Id.* The purpose of the preference is to give public bodies the benefit of public power, and to provide low-cost power to the greatest number of consumers. *Fereday, supra*, at 604, 632-33. Congress also intended to provide low-cost power to residential consumers of private utilities. H.R.Rep.No.976 (Part II), *supra*, at 34-35.

To effectuate these purposes, the Act contemplates that the DSIs will pay rates sufficiently high to cover BPA's cost of acquiring new resources and to subsidize the sale of low-cost power to residential customers of private utilities. The DSIs argue that the assurance of power to their first quartile was a necessary inducement for them to enter the contracts requiring them to pay significantly higher rates. We disagree. Congress provided an ample incentive for the DSIs to enter the new contracts. Many of the DSIs' prior contracts would have expired soon after the Act was passed and those DSIs would have had to pay higher rates for whatever replacement power they could find after the expiration of their contracts. H.R.Rep.No.976 (Part I), *supra*,

equivalent amount of the DSI loads in the later periods (without provisional or advance energy being made available for this amount of the DSI load).

Id. The above-quoted sentence refers to a plan called Firm Energy Load Carrying Capability by which BPA borrows power from future years on the probability that there will be greater than critical water levels. The sentence indicates that treating the DSI load as firm means using only this plan to meet the DSIs needs. This is particularly evident in the provision that BPA need not supply the amount of power borrowed from future years if the water levels are low.

The reference to "treating the DSI load as firm in the operation" is ambiguous because the first quartile cannot be treated as firm entirely. Unlike firm power, it is interruptible and subject to priorities. If the first quartile does not have all the attributes of firm power in the context of operations, the phrase "treat as firm" does not indicate what firm attributes the first quartile has.

at 28. The primary incentive for the DSIs to enter the contracts was the long-term security they gained from the new twenty-year contracts.⁸

Although there is no case authority directly on point, *City of Santa Clara, California v. Andrus*, 572 F.2d 660 (9th Cir.), *cert. denied*, 439 U.S. 859, 99 S.Ct. 176, 58 L.Ed. 2d 167 (1978) is instructive on the purposes and proper interpretation of a preference clause. In *Santa Clara*, the Secretary of the Interior, acting through the Bureau of Reclamation, "banked" power produced pursuant to the Reclamation Project Act of 1939 (43 U.S.C. §§ 375a, 387-89, 485 *et seq.*) with a non-preference customer instead of selling it directly to a preference customer. The Secretary argued that the arrangement was designed to enable him to supply the future needs of selected preference customers. 572 F.2d at 669. This court held that the provisional sale of power to a non-preference customer when a preference customer [715] is ready and willing to buy it contravened the purpose of the preference because the non-preference customer would profit from low-cost power at the expense of the preference customer. *Id.* at 670-71. Although the court recognized that the ultimate goal of the Secretary's scheme was consonant with the preference clause, it nevertheless found that the interim effect was inconsistent with the preference clause, and, therefore, held the scheme invalid.

⁸Although we ultimately hold for the preference customers, we note that we do not find persuasive their argument that BPA's interpretation is unreasonable because it provides a disincentive for them to build new power facilities. The incentives that Congress provided preference customers for constructing power facilities are that: (1) they can receive credit on their current power bill for the cost of constructing facilities that reduce BPA's obligation to acquire resources (Act as § 6(h)); or (2) they can sell the capacity to BPA at a reasonable price while paying low federal rates for power (Act at §§ 6(a)(2), 6(i)(2), 7(b)(1)). Congress, the body authorized to do so, provided ample incentives, irrespective of the preference clause's application to nonfirm power.

The contention in the present case that the sale of non-firm energy to DSIs serves the preference clause by creating reserves and earning revenue that can reduce the rates of all preference customers is answered by *Santa Clara*. BPA's policy may serve the preference clause, but the immediate effect, like that in *Santa Clara*, is antithetical to preference rights, and, therefore, is not consonant with the preference clause.⁹ The fact that BPA's policy may enable it to profit more from selling the nonfirm energy to the DSIs and that all of its customers would thereby benefit does not persuade us that its interpretation is reasonable. As explained in *Santa Clara*, the purposes of the Act and its preference clause are best served by an interpretation that ensures the sale of power to preference customers. BPA's interpretation to the contrary, without explicit Congressional direction, contravenes the purposes of the preference clause.

CONCLUSION

[4] Congress strongly reaffirmed in the Act the long-standing preference given to public bodies in the sale of federal power. The Act contains no explicit direction from

⁹BPA's reliance on *Volunteer Electric Cooperative v. Tennessee Valley Authority*, 139 F.Supp. 22 (E.D.Tenn.1954), *aff'd mem.*, 231 F.2d 446 (6th Cir. 1956) is misplaced. In *Volunteer*, TVA sold directly to an industrial customer instead of allowing its preference customer to serve the industry and gain the profit. The court held that TVA could serve the industry directly because the benefit would be shared by all customers, not just the one utility, and that that approach served the Act's purpose to provide low-cost power. The present case is not one in which a preference customer profits from selling power acquired through the preference to the industries who also want the power. Here, the preference customers want the low-cost power for their customers. To the extent that *Volunteer* holds that the power agency may bypass the preference if the bypass benefits all of its customers, *Volunteer* is contradicted by *Santa Clara*.

Congress to create an exception to the preference with respect to the provision of nonfirm power to DSIs. We hold that BPA's interpretation is unreasonable because it contravenes the longstanding preference explicitly continued under the Act and is without express statutory support.¹⁰ Accordingly, we remand the matter to BPA with directions for further action consistent with this opinion.

¹⁰Because we find that the priority given the DSIs for nonfirm power violates the preference provisions of the Act, we need not determine whether BPA failed to follow required procedures in adopting its interpretation of the Act.

82-1071

Office Supreme Court, U.S.
FILED

DEC 23 1982

In the Supreme Court

ALEXANDER L. STEVAS,
CLERK

OF THE

United States

OCTOBER TERM, 1982

ALUMINUM COMPANY OF AMERICA, et al.,

Petitioners,

v.

CENTRAL LINCOLN PEOPLES' UTILITY DISTRICT, et al.,

Respondents,

and

PETER JOHNSON, as Administrator of the Bonneville
Power Administration, Department of Energy,

and JAMES EDWARDS, as Secretary of the
Department of Energy, and the

UNITED STATES OF AMERICA,

Respondents.

APPENDIX TO
PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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| Appendix A | Opinion and Judgment of the Ninth Circuit (attached to Petition) |
| Appendix B | Pacific Northwest Electric Power Planning and Conservation Act |
| Appendix C | 125 Cong. Rec. S 11592 (daily ed. Aug. 3, 1979) (remarks of Sen. Hatfield) |
| Appendix D | House Commerce Report, H.R. Rep. No. 967 (I), 96th Cong. 2d Sess. (1980) |
| Appendix E | House Interior Report, H.R. Rep. No. 967 (II), 96th Cong. 2d Sess. (1980) |
| Appendix F | Senate Report, S. Rep. No. 272, 96th Cong., 1st Sess. (1979) |
| Appendix G | 125 Cong. Rec. H 9848-49, H 9864 (daily ed. Sept. 29, 1980) (remarks of Rep. Dingell and Rep. Foley) |
| Appendix H | DSI Contract (1981) Sections 7(c), 7(d), 14 |
| Appendix I | Letter of BPA Administrator to Hon. Abra- ham B. Kazen (Aug. 19, 1980) |
| Appendix J | 126 Cong. Rec. S 14691, S 14698 (daily ed. Nov. 19, 1980) (remarks of Sen. Jackson and Sen. McClure) |
| Appendix K | Memorandum regarding "BPA Obligations With Respect to DSI Top Quartile" (Feb. 12, 1981) |
| Appendix L | 126 Cong. Rec. H 10678 (daily ed. Nov. 17, 1980) (remarks of Rep. Foley) |
| Appendix M | Cover Letter by BPA Administrator Offer- ing New DSI Contract (Aug. 27, 1981) |

- Appendix N DSI Contract (1975) Sections 4, 7, General Contract Provisions, Section 8(b)
- Appendix O Statement of Jack A. Speer before House Subcomm. on Water and Power Resources
- Appendix P Bonneville Power Administration, U.S. Dept. of the Interior, *Draft Environmental Statement* (DES-77-21) II-71 (July 22, 1977)
- Appendix Q Pub. L. 87-701 § 112(e) (Sept. 26, 1962) 76 Stat. 604
- Appendix R List of DSI Parents, Subsidiaries, and Affiliates

Appendix B

PUBLIC LAW 96-501—96TH CONGRESS AN ACT

To assist the electrical consumers of the Pacific Northwest through use of the Federal Columbia River Power System to achieve cost-effective energy conservation, to encourage the development of renewable energy resources, to establish a representative regional power planning process, to assure the region of an efficient and adequate power supply, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SHORT TITLE AND TABLE OF CONTENTS

SECTION 1. This Act, together with the following table of contents, may be cited as the "Pacific Northwest Electric Power Planning and Conservation Act".

TABLE OF CONTENTS

- SECTION 1. Short title and table of contents.
- SECTION 2. Purposes.
- SECTION 3. Definitions.
- SECTION 4. Regional planning and participation.
- SECTION 5. Sale of power.
- SECTION 6. Conservation and resource acquisition.
- SECTION 7. Rates.
- SECTION 8. Amendments to existing law.
- SECTION 9. Administrative provisions.
- SECTION 10. Savings provisions.
- SECTION 11. Effective date.
- SECTION 12. Severability.

PURPOSES

SECTION 2. The purposes of this Act, together with the provisions of other laws applicable to the Federal Columbia River Power System, are all intended to be construed in a consistent manner. Such purposes are also intended to be construed in a manner consistent with applicable environmental laws. Such purposes are:

(1) to encourage, through the unique opportunity provided by the Federal Columbia River Power System—

(A) conservation and efficiency in the use of electric power, and

(B) the development of renewable resources within the Pacific Northwest;

(2) to assure the Pacific Northwest of an adequate, efficient, economical, and reliable power supply;

(3) to provide for the participation and consultation of the Pacific Northwest States, local governments, consumers, customers, users of the Columbia River System (including Federal and State fish and wildlife agencies and appropriate Indian tribes), and the public at large within the region in—

(A) the development of regional plans and programs related to energy conservation, renewable resources, other resources, and protecting, mitigating, and enhancing fish and wildlife resources,

(B) facilitating the orderly planning of the region's power system, and

(C) providing environmental quality;

(4) to provide that the customers of the Bonneville Power Administration and their consumers continue to pay all costs necessary to produce, transmit, and conserve resources to meet the region's electric power requirements, including the amortization on a current

basis of the Federal investment in the Federal Columbia River Power System;

(5) to insure, subject to the provisions of this Act—

(A) that the authorities and responsibilities of State and local governments, electric utility systems, water management agencies, and other non-Federal entities for the regulation, planning, conservation, supply, distribution, and use of electric power shall be construed to be maintained, and

(B) that Congress intends that this Act not be construed to limit or restrict the ability of customers to take actions in accordance with other applicable provisions of Federal or State law, including, but not limited to, actions to plan, develop, and operate resources and to achieve conservation, without regard to this Act; and

(6) to protect, mitigate and enhance the fish and wildlife, including related spawning grounds and habitat, of the Columbia River and its tributaries, particularly anadromous fish which are of significant importance to the social and economic well-being of the Pacific Northwest and the Nation and which are dependent on suitable environmental conditions substantially obtainable from the management and operation of the Federal Columbia River Power System and other power generating facilities on the Columbia River and its tributaries.

DEFINITIONS

SECTION 3. As used in this Act, the term—

(1) "Acquire" and "acquisition" shall not be construed as authorizing the Administrator to construct, or have ownership of, under this Act or any other law, any electric generating facility.

(2) "Administrator" means the Administrator of the Bonneville Power Administration.

(3) "Conservation" means any reduction in electric power consumption as a result of increases in the efficiency of energy use, production, or distribution.

(4)(A) "Cost-effective", when applied to any measure or resource referred to in this Act, means that such measure or resource must be forecast—

(i) to be reliable and available within the time it is needed, and

(ii) to meet or reduce the electric power demand, as determined by the Council or the Administrator, as appropriate, of the consumers of the customers at an estimated incremental system cost no greater than that of the least-cost similarly reliable and available alternative measure or resource, or any combination thereof.

(B) For purposes of this paragraph, the term "system cost" means an estimate of all direct costs of a measure or resource over its effective life, including, if applicable, the cost of distribution and transmission to the consumer and, among other factors, waste disposal costs, end-of-cycle costs, and fuel costs (including projected increases), and such quantifiable environmental costs and benefits as the Administrator determines, on the basis of a methodology developed by the Council as part of the plan, or in the absence of the plan by the Administrator, are directly attributable to such measure or resource.

(C) In determining the amount of power that a conservation measure or other resources may be expected to save or to produce, the Council or the Administrator, as the case may be, shall take into account projected realization factors and plant factors, including appropriate historical experience with similar measures or resources.

(D) For purposes of this paragraph, the "estimated incremental system cost" of any conservation measure or resource shall not be treated as greater than that of any nonconservation measure or resource unless the incremental system cost of such conservation measure or resource is in excess of 110 per centum of the incremental system cost of the nonconservation measure or resource.

(5) "Consumer" means any end user of electric power.

(6) "Council" means, unless otherwise specifically provided, the members appointed to the Pacific Northwest Electric Power and Conservation Planning Council established pursuant to section 4.

(7) "Customer" means anyone who contracts for the purchase of power from the Administrator pursuant to this Act.

(8) "Direct service industrial customer" means an industrial customer that contracts for the purchase of power from the Administrator for direct consumption.

(9) "Electric power" means electric peaking capacity, or electric energy, or both.

(10) "Federal base system resources" means—

(A) the Federal Columbia River System hydroelectric projects;

(B) resources acquired by the Administrator under long-term contracts in force on the effective date of this Act; and

(C) resources acquired by the Administrator in an amount necessary to replace reductions in capability of the resources referred to in subparagraphs (A) and (B) of this paragraph.

(11) "Indian tribe" means any Indian tribe or band which is located in whole or in part in the region and which has a governing body which is recognized by the Secretary of the Interior.

(12) "Major resource" means any resource that—

(A) has a planned capability greater than fifty average megawatts, and

(B) if acquired by the Administrator, is acquired for a period of more than five years.

Such term does not include any resource acquired pursuant to section 11(b)(6) of the Federal Columbia River Transmission System Act.

(13) "New large single load" means any load associated with a new facility, an existing facility, or an expansion of an existing facility—

(A) which is not contracted for, or committed to, as determined by the Administrator, by a public body, cooperative, investor-owned utility, or Federal agency customer prior to September 1, 1979, and

(B) which will result in an increase in power requirements of such customer of ten average megawatts or more in any consecutive twelve-month period.

(14) "Pacific Northwest", "region", or "regional" means—

(A) the area consisting of the States of Oregon, Washington, and Idaho, the portion of the State of Montana west of the Continental Divide,

and such portions of the States of Nevada, Utah, and Wyoming as are within the Columbia River drainage basin; and

(B) any contiguous areas, not in excess of seventy-five air miles from the area referred to in subparagraph (A), which are a part of the service area of a rural electric cooperative customer served by the Administrator on the effective date of this Act which has a distribution system from which it serves both within and without such region.

(15) "Plan" means the Regional Electric Power and Conservation plan (including any amendments thereto) adopted pursuant to this Act and such plan shall apply to actions of the Administrator as specified in this Act.

(16) "Renewable resource" means a resource which utilizes solar, wind, hydro, geothermal, biomass, or similar sources of energy and which either is used for electric power generation or will reduce the electric power requirements of a consumer, including by direct application.

(17) "Reserves" means the electric power needed to avert particular planning or operating shortages for the benefit of firm power customers of the Administrator and available to the Administrator (A) from resources or (B) from rights to interrupt, curtail, or otherwise withdraw, as provided by specific contract provisions, portions of the electric power supplied to customers.

(18) "Residential use" or "residential load" means all usual residential, apartment, seasonal dwelling and farm electrical loads or uses, but only the first four hundred horsepower during any monthly billing period of farm irrigation and pumping for any farm.

(19) "Resource" means—

(A) electric power, including the actual or planned electric power capability of generating facilities, or

(B) actual or planned load reduction resulting from direct application of a renewable energy resource by a consumer, or from a conservation measure.

(20) "Secretary" means the Secretary of Energy.

REGIONAL PLANNING AND PARTICIPATION

SECTION 4. (a)(1) The purposes of this section are to provide for the prompt establishment and effective operation of the Pacific Northwest Electric Power and Conservation Planning Council, to further the purposes of this Act by the Council promptly preparing and adopting (A) a regional conservation and electric power plan and (B) a program to protect, mitigate, and enhance fish and wildlife, and to otherwise expeditiously and effectively carry out the Council's responsibilities and functions under this Act.

(2) To achieve such purposes and facilitate cooperation among the States of Idaho, Montana, Oregon, and Washington, and with the Bonneville Power Administration, the consent of Congress is given for an agreement described in this paragraph and not in conflict with this Act, pursuant to which—

(A) there shall be established a regional agency known as the "Pacific Northwest Electric Power and Conservation Planning Council" which (i) shall have its offices in the Pacific Northwest, (ii) shall carry out its functions and responsibilities in accordance with the provisions of this Act, (iii) shall continue in force and effect in accordance with the provisions of this Act, and (iv) except as otherwise provided in this Act,

shall not be considered an agency or instrumentality of the United States for the purpose of any Federal law; and

(B) two persons from each State may be appointed, subject to the applicable laws of each such State, to undertake the functions and duties of members of the Council.

The State may fill any vacancy occurring prior to the expiration of the term of any member. The appointment of six initial members, subject to applicable State law, by June 30, 1981, by at least three of such States shall constitute an agreement by the States establishing the Council and such agreement is hereby consented to by the Congress. Upon request of the Governors of two of the States, the Secretary shall extend the June 30, 1981, date for six additional months to provide more time for the States to make such appointments.

(3) Except as otherwise provided by State law, each member appointed to the Council shall serve for a term of three years, except that, with respect to members initially appointed, each Governor shall designate one member to serve a term of two years and one member to serve a term of three years. The members of the Council shall select from among themselves a chairman. The members and officers and employees of the Council shall not be deemed to be officers or employees of the United States for any purpose. The Council shall appoint, fix compensation, and assign and delegate duties to such executive and additional personnel as the Council deems necessary to fulfill its functions under this Act, taking into account such information and analyses as are, or are likely to be, available from other sources pursuant to provisions of this Act. The compensation of the members shall be fixed by State law. The compensation of the members and officers shall not exceed the rate prescribed for Federal officers and positions at step 1 of level GS-18 of the General Schedule.

(4) For the purpose of providing a uniform system of laws, in addition to this Act, applicable to the Council relating to the making of contracts, conflicts-of-interest, financial disclosure, open meetings of the Council, advisory committees, disclosure of information, judicial review of Council functions and actions under this Act, and related matters, the Federal laws applicable to such matters in the case of the Bonneville Power Administration shall apply to the Council to the extent appropriate, except that with respect to open meetings, the Federal laws applicable to open meetings in the case of the Federal Energy Regulatory Commission shall apply to the Council to the extent appropriate. In applying the Federal laws applicable to financial disclosure under the preceding sentence, such laws shall be applied to members of the Council without regard to the duration of their service on the Council or the amount of compensation received for such service. No contract, obligation, or other action of the Council shall be construed as an obligation of the United States or an obligation secured by the full faith and credit of the United States. For the purpose of judicial review of any action of the Council or challenging any provision of this Act relating to functions and responsibilities of the Council, notwithstanding any other provision of law, the courts of the United States shall have exclusive jurisdiction of any such review.

(b)(1) If the Council is not established and its members are not timely appointed in accordance with subsection (a) of this section, or if, at any time after such Council is established and its members are appointed in accordance with subsection (a)—

(A) any provision of this Act relating to the establishment of the Council or to any substantial function or responsibility of the Council (including any function or responsibility under subsection(d) or (h) of this section or under section 6(e) of this Act) is held to be unlawful by a final determination of any Federal court, or

(B) the plan or any program adopted by such Council under this section is held by a final determination of such a court to be ineffective by reason of subsection (a)(2)(B),

the Secretary shall establish the Council pursuant to this subsection as a Federal agency. The Secretary shall promptly publish a notice thereof in the Federal Register and notify the Governors of each of the States referred to in subsection (a) of this section.

(2) As soon as practicable, but not more than thirty days after the publication of the notice referred to in paragraph (1) of this subsection, and thereafter within forty-five days after a vacancy occurs, the Governors of the States of Washington, Oregon, Idaho, and Montana may each (under applicable State laws, if any) provide to the Secretary a list of nominations from such State for each of the State's positions to be selected for such Council. The Secretary may extend this time an additional thirty days. The list shall include at least two persons for each such position. The list shall include such information about such nominees as the Secretary may request. The Secretary shall appoint the Council members from each Governor's list of nominations for each State's positions, except that the Secretary may decline to appoint for any reason any of a Governor's nominees for a position and shall so notify the Governor. The Governor may thereafter make successive nominations within forty-five days of receipt of such notice until nominees acceptable to the Secretary are appointed for each position. In the event the Governor of any such State fails to make the required nominations for any State position on such Council within the time specified for such nominations, the Secretary shall select from such State and appoint the Council member or members for such position. The members of the Council shall select from among themselves one member of the Council as Chairman.

(3) The members of the Council established by this subsection who are not employed by the United States or a State shall receive compensation at a rate equal to the rate prescribed for offices and positions at level GS-18 of the General Schedule for each day such members are engaged in the actual performance of duties as members of such Council, except that no such member may be paid more in any calendar year than an officer or employee at step 1 of level GS-18 is paid during such year. Members of such Council shall be considered officers or employees of the United States for purposes of title II of the Ethics in Government Act of 1978 (5 U.S.C. app.) and shall also be allowed travel expenses, including per diem in lieu of subsistence, in the same manner as persons employed intermittently in Government service are allowed expenses under section 5703 of title 5 of the United States Code. Such Council may appoint, and assign duties to, an executive director who shall serve at the pleasure of such Council and who shall be compensated at the rate established for GS-18 of the General Schedule. The executive director shall exercise the powers and duties delegated to such director by such Council, including the power to appoint and fix compensation of additional personnel in accordance with applicable Federal law to carry out the functions and responsibilities of such Council.

(4) When a Council is established under this subsection after a Council was established pursuant to subsection (a) of this section, the Secretary shall provide, to the greatest extent feasible, for the transfer to the Council established by this subsection of all funds, books, papers, documents, equipment, and other matters in order to facilitate the Council's capability to achieve the requirements of subsections (d) and (h) of this section. In order to carry out its functions and responsibilities under this Act expeditiously, the Council shall take into consideration any ac-

tions of the Council under subsection (a) and may review, modify, or confirm such actions without further proceedings.

(5)(A) At any time beginning one year after the plan referred to in such subsection (d) and the program referred to in such subsection (h) of this section are both finally adopted in accordance with this Act, the Council established pursuant to this subsection shall be terminated by the Secretary 90 days after the Governors of three of the States referred to in this subsection jointly provide for any reason to the Secretary a written request for such termination. Except as provided in subparagraph (B), upon such termination all functions and responsibilities of the Council under this Act shall also terminate.

(B) Upon such termination of the Council, the functions and responsibilities of the Council set forth in subsection (h) of this section shall be transferred to, and continue to be funded and carried out, jointly, by the Administrator, the Secretary of the Interior, and the Administrator of the National Marine Fisheries Service, in the same manner and to the same extent as required by such subsection and in cooperation with the Federal and the region's State fish and wildlife agencies and Indian tribes referred to in subsection (h) of this section and the Secretary shall provide for the transfer to them of all records, books, documents, funds, and personnel of such Council that relate to subsection (h) matters. In order to carry out such functions and responsibilities expeditiously, the Administrator, the Secretary of the Interior, and the Administrator of the National Marine Fisheries Service shall take into consideration any actions of the Council under this subsection, and may review, modify, or confirm such actions without further proceedings. In the event the Council is terminated pursuant to this paragraph, whenever any action of the Administrator requires any approval or other action by the Council, the Administrator may take such action without

such approval or action, except that the Administrator may not implement any proposal to acquire a major generating resource or to grant billing credits involving a major generating resource until the expenditure of funds for that purpose is specifically authorized by Act of Congress enacted after such termination.

(c)(1) The provisions of this subsection shall, except as specifically provided in this subsection, apply to the Council established pursuant to either subsection (a) or (b) of this section.

(2) A majority of the members of the Council shall constitute a quorum. Except as otherwise provided specifically in this Act, all actions and decisions of the Council shall be by majority vote of the members present and voting. The plan or any part thereof and any amendment thereto shall not be approved unless such plan or amendment receives the votes of—

(A) a majority of the members appointed to the Council, including the vote of at least one member from each State with members on the Council; or

(B) at least six members of the Council.

(3) The Council shall meet at the call of the Chairman or upon the request of any three members of the Council. If any member of the Council disagrees with respect to any matter transmitted to any Federal or State official or any other person or wishes to express additional views concerning such matter, such member may submit a statement to accompany such matter setting forth the reasons for such disagreement or views.

(4) The Council shall determine its organization and prescribe its practices and procedures for carrying out its functions and responsibilities under this Act. The Council shall make available to the public a statement of its organization, practices, and procedures, and make available to the public its annual work program budget at the time the President submits his annual budget to Congress.

(5) Upon request of the Council established pursuant to subsection (b) of this section, the head of any Federal agency is authorized to detail or assign to the Council, on a reimbursable basis, any of the personnel of such agency to assist the Council in the performance of its functions under this Act.

(6) At the Council's request, the Administrator of the General Services Administration shall furnish the Council established pursuant to subsection (b) of this section with such offices, equipment, supplies, and services in the same manner and to the same extent as such Administrator is authorized to furnish to any other Federal agency or instrumentality such offices, supplies, equipment, and services.

(7) Upon the request of the Congress or any committee thereof, the Council shall promptly provide to the Congress, or to such committee, any record, report, document, material, and other information which is in the possession of the Council.

(8) To obtain such information and advice as the Council determines to be necessary or appropriate to carry out its functions and responsibilities pursuant to this Act, the Council shall, to the greatest extent practicable, solicit engineering, economic, social, environmental, and other technical studies from customers of the Administrator and from other bodies or organizations in the region with particular expertise.

(9) The Administrator and other Federal agencies, to the extent authorized by other provisions of law, shall furnish the Council all information requested by the Council as necessary for performance of its functions, subject to such requirements of law concerning trade secrets and proprietary data as may be applicable.

(10)(A) At the request of the Council, the Administrator shall pay from funds available to the Administrator the

compensation and other expenses of the Council as are authorized by this Act, including the reimbursement of those States with members on the Council for services and personnel to assist in preparing a plan pursuant to subsection (d) and a program pursuant to subsection (h) of this section, as the Council determines are necessary or appropriate for the performance of its functions and responsibilities. Such payments shall be included by the Administrator in his annual budgets submitted to Congress pursuant to the Federal Columbia River Transmission System Act and shall be subject to the requirements of that Act, including the audit requirements of section 11(d) of such Act. The records, reports, and other documents of the Council shall be available to the Comptroller General for review in connection with such audit or other review and examination by the Comptroller General pursuant to other provisions of law applicable to the Comptroller General. Funds provided by the Administrator for such payments shall not exceed annually an amount equal to 0.02 mill multiplied by the kilowatt hours of firm power forecast to be sold by the Administrator during the year to be funded. In order to assist the Council's initial organization, the Administrator after the enactment of this Act shall promptly prepare and propose an amended annual budget to expedite payment for Council activities.

(B) Notwithstanding the limitation contained in the fourth sentence of subparagraph (A) of this paragraph, upon an annual showing by the Council that such limitation will not permit the Council to carry out its functions and responsibilities under this Act the Administrator may raise such limit up to any amount not in excess of 0.10 mill multiplied by the kilowatt hours of firm power forecast to be sold by the Administrator during the year to be funded.

(11) The Council shall establish a voluntary scientific and statistical advisory committee to assist in the development, collection, and evaluation of such statistical, biological,

economic, social, environmental, and other scientific information as is relevant to the Council's development and amendment of a regional conservation and electric power plan.

(12) The Council may establish such other voluntary advisory committees as it determines are necessary or appropriate to assist it in carrying out its functions and responsibilities under this Act.

(13) The Council shall ensure that the membership for any advisory committee established or formed pursuant to this section shall, to the extent feasible, include representatives of, and seek the advice of, the Federal, and the various regional, State, local, and Indian Tribal Governments, consumer groups, and customers.

(d)(1) Within two years after the Council is established and the members are appointed pursuant to subsection (a) or (b) of this section, the Council shall prepare, adopt, and promptly transmit to the Administrator a regional conservation and electric power plan. The adopted plan, or any portion thereof, may be amended from time to time, and shall be reviewed by the Council not less frequently than once every five years. Prior to such adoption, public hearings shall be held in each Council member's State on the plan or substantial, nontechnical amendments to the plan proposed by the Council for adoption. A public hearing shall also be held in any other State of the region on the plan or amendments thereto, if the Council determines that the plan or amendments would likely have a substantial impact on that State in terms of major resources which may be developed in that State and which the Administrator may seek to acquire. Action of the Council under this subsection concerning such hearings shall be subject to section 553 of title 5, United States Code and such procedure as the Council shall adopt.

(2) Following adoption of the plan and any amendment thereto, all actions of the Administrator pursuant to sec-

tion 6 of this Act shall be consistent with the plan and any amendment thereto, except as otherwise specifically provided in this Act.

(e)(1) The plan shall, as provided in this paragraph, give priority to resources which the Council determines to be cost-effective. Priority shall be given: first, to conservation; second, to renewable resources; third, to generating resources utilizing waste heat or generating resources of high fuel conversion efficiency; and fourth, to all other resources.

(2) The plan shall set forth a general scheme for implementing conservation measures and developing resources pursuant to section 6 of this Act to reduce or meet the Administrator's obligations with due consideration by the Council for (A) environmental quality, (B) compatibility with the existing regional power system, (C) protection, mitigation, and enhancement of fish and wildlife and related spawning grounds and habitat, including sufficient quantities and qualities of flows for successful migration, survival, and propagation of anadromous fish, and (D) other criteria which may be set forth in the plan.

(3) To accomplish the priorities established by this subsection, the plan shall include the following elements which shall be set forth in such detail as the Council determines to be appropriate:

(A) an energy conservation program to be implemented under this Act, including, but not limited to, model conservation standards;

(B) recommendation for research and development;

(C) a methodology for determining quantifiable environmental costs and benefits under section 3(4);

(D) a demand forecast of at least twenty years (developed in consultation with the Administrator, the customers, the States, including State agencies with ratemaking authority over electric utilities, and the

public, in such manner as the Council deems appropriate) and a forecast of power resources estimated by the Council to be required to meet the Administrator's obligations and the portion of such obligations the Council determines can be met by resources in each of the priority categories referred to in paragraph (1) of this subsection which forecast (i) shall include regional reliability and reserve requirements, (ii) shall take into account the effect, if any, of the requirements of subsection (h) on the availability of resources to the Administrator, and (iii) shall include the approximate amounts of power the Council recommends should be acquired by the Administrator on a long-term basis and may include, to the extent practicable, an estimate of the types of resources from which such power should be acquired;

(E) an analysis of reserve and reliability requirements and cost-effective methods of providing reserves designed to insure adequate electric power at the lowest probable cost;

(F) the program adopted pursuant to subsection (h); and

(G) if the Council recommends surcharges pursuant to subsection (f) of this section, a methodology for calculating such surcharges.

(4) The Council, taking into consideration the requirement that it devote its principal efforts to carrying out its responsibilities under subsections (d) and (h) of this section, shall undertake studies of conservation measures reasonably available to direct service industrial customers and other major consumers of electric power within the region and make an analysis of the estimated reduction in energy use which would result from the implementation of such measures as rapidly as possible, consistent with sound business practices. The Council shall consult with

such customers and consumers in the conduct of such studies.

(f)(1) Model conservation standards to be included in the plan shall include, but not be limited to, standards applicable to (A) new and existing structures, (B) utility, customer, and governmental conservation programs, and (C) other consumer actions for achieving conservation. Model conservation standards shall reflect geographic and climatic differences within the region and other appropriate considerations, and shall be designed to produce all power savings that are cost-effective for the region and economically feasible for consumers, taking into account financial assistance made available to consumers under section 6(a) of this Act. These model conservation standards shall be adopted by the Council and included in the plan after consultation, in such manner as the Council deems appropriate, with the Administrator, States, and political subdivisions, customers of the Administrator, and the public.

(2) The Council by a majority vote of the members of the Council is authorized to recommend to the Administrator a surcharge and the Administrator may thereafter impose such a surcharge, in accordance with the methodology provided in the plan, on customers for those portions of their loads within the region that are within States or political subdivisions which have not, or on the Administrator's customers which have not, implemented conservation measures that achieve energy savings which the Administrator determines are comparable to those which would be obtained under such standards. Such surcharges shall be established to recover such additional costs as the Administrator determines will be incurred because such projected energy savings attributable to such conservation measures have not been achieved, but in no case may such surcharges be less than 10 per centum or more than 50

per centum of the Administrator's applicable rates for such load or portion thereof.

(g)(1) To insure widespread public involvement in the formulation of regional power policies, the Council and Administrator shall maintain comprehensive programs to—

(A) inform the Pacific Northwest public of major regional power issues,

(B) obtain public views concerning major regional power issues, and

(C) secure advice and consultation from the Administrator's customers and others.

(2) In carrying out the provisions of this section, the Council and the Administrator shall—

(A) consult with the Administrator's customers;

(B) include the comments of such customers in the record of the Council's proceedings; and

(C) recognize and not abridge the authorities of State and local governments, electric utility systems, and other non-Federal entities responsible to the people of the Pacific Northwest for the planning, conservation, supply, distribution, and use of electric power and the operation of electric generating facilities.

(3) In the preparation, adoption, and implementation of the plan, the Council and the Administrator shall encourage the cooperation, participation, and assistance of appropriate Federal agencies, State entities, State political subdivisions, and Indian tribes. The Council and the Administrator are authorized to contract, in accordance with applicable law, with such agencies, entities, tribes, and subdivisions individually, in groups, or through associations thereof to (A) investigate possible measures to be included in the plan, (B) provide public involvement and information regarding a proposed plan or amendment thereto, and (C) provide services which will assist in the

implementation of the plan. In order to assist in the implementation of the plan, particularly conservation, renewable resource, and fish and wildlife activities, the Administrator, when requested and subject to available funds, may provide technical assistance in establishing conservation, renewable resource, and fish and wildlife objectives by individual States or subdivisions thereof or Indian tribes. Such objectives, if adopted by a State or subdivision thereof or Indian tribes, may be submitted to the Council and the Administrator for review, and upon approval by the Council, may be incorporated as part of the plan.

(h)(1)(A) The Council shall promptly develop and adopt, pursuant to this subsection, a program to protect, mitigate, and enhance fish and wildlife, including related spawning grounds and habitat, on the Columbia River and its tributaries. Because of the unique history, problems, and opportunities presented by the development and operation of hydroelectric facilities on the Columbia River and its tributaries, the program, to the greatest extent possible, shall be designed to deal with that river and its tributaries as a system.

(B) This subsection shall be applicable solely to fish and wildlife, including related spawning grounds and habitat, located on the Columbia River and its tributaries. Nothing in this subsection shall alter, modify, or affect in any way the laws applicable to rivers or river systems, including electric power facilities related thereto, other than the Columbia River and its tributaries, or affect the rights and obligations of any agency, entity, or person under such laws.

(2) The Council shall request, in writing, promptly after the Council is established under either section 4(a) or 4(b) of this Act and prior to the development or review of the plan, or any major revision thereto, from the Federal, and the region's State, fish and wildlife agencies and from the region's appropriate Indian tribes, recommendations for—

(A) measures which can be expected to be implemented by the Administrator, using authorities under this Act and other laws, and other Federal agencies to protect, mitigate, and enhance fish and wildlife, including related spawning grounds and habitat, affected by the development and operation of any hydroelectric project on the Columbia River and its tributaries;

(B) establishing objectives for the development and operation of such projects on the Columbia River and its tributaries in a manner designed to protect, mitigate, and enhance fish and wildlife; and

(C) fish and wildlife management coordination and research and development (including funding) which, among other things, will assist protection, mitigation, and enhancement of anadromous fish at, and between, the region's hydroelectric dams.

(3) Such agencies and tribes shall have 90 days to respond to such request, unless the Council extends the time for making such recommendations. The Federal, and the region's, water management agencies, and the region's electric power producing agencies, customers, and public may submit recommendations of the type referred to in paragraph (2) of this subsection. All recommendations shall be accompanied by detailed information and data in support of the recommendations.

(4)(A) The Council shall give notice of all recommendations and shall make the recommendations and supporting documents available to the Administrator, to the Federal, and the region's, State fish and wildlife agencies, to the appropriate Indian tribes, to Federal agencies responsible for managing, operating, or regulating hydroelectric facilities located on the Columbia River or its tributaries, and to any customer or other electric utility which owns or operates any such facility. Notice shall also be given to the public. Copies of such recommendations and supporting documents shall be made available for review at the

offices of the Council and shall be available for reproduction at reasonable cost.

(B) The Council shall provide for public participation and comment regarding the recommendations and supporting documents, including an opportunity for written and oral comments, within such reasonable time as the Council deems appropriate.

(5) The Council shall develop a program on the basis of such recommendations, supporting documents, and views and information obtained through public comment and participation, and consultation with the agencies, tribes, and customers referred to in subparagraph (A) of paragraph (4). The program shall consist of measures to protect, mitigate, and enhance fish and wildlife affected by the development, operation, and management of such facilities while assuring the Pacific Northwest an adequate, efficient, economical, and reliable power supply. Enhancement measures shall be included in the program to the extent such measures are designed to achieve improved protection and mitigation.

(6) The Council shall include in the program measures which it determines, on the basis set forth in paragraph (5), will—

(A) complement the existing and future activities of the Federal and the region's State fish and wildlife agencies and appropriate Indian tribes;

(B) be based on, and supported by, the best available scientific knowledge;

(C) utilize, where equally effective alternative means of achieving the same sound biological objective exist, the alternative with the minimum economic cost;

(D) be consistent with the legal rights of appropriate Indian tribes in the region; and

(E) in the case of anadromous fish—

(i) provide for improved survival of such fish at hydroelectric facilities located on the Columbia River system; and

(ii) provide flows of sufficient quality and quantity between such facilities to improve production, migration, and survival of such fish as necessary to meet sound biological objectives.

(7) The Council shall determine whether each recommendation received is consistent with the purposes of this Act. In the event such recommendations are inconsistent with each other, the Council, in consultation with appropriate entities, shall resolve such inconsistency in the program giving due weight to the recommendations, expertise, and legal rights and responsibilities of the Federal and the region's State fish and wildlife agencies and appropriate Indian tribes. If the Council does not adopt any recommendation of the fish and wildlife agencies and Indian tribes as part of the program or any other recommendation, it shall explain in writing, as part of the program, the basis for its finding that the adoption of such recommendation would be—

(A) inconsistent with paragraph (5) of this subsection;

(B) inconsistent with paragraph (6) of this subsection; or

(C) less effective than the adopted recommendations for the protection, mitigation, and enhancement of fish and wildlife.

(8) The Council shall consider, in developing and adopting a program pursuant to this subsection, the following principles:

(A) Enhancement measures may be used, in appropriate circumstances, as a means of achieving offsite protection and mitigation with respect to compensation for losses arising from the development and op-

eration of the hydroelectric facilities of the Columbia River and its tributaries as a system.

(B) Consumers of electric power shall bear the cost of measures designed to deal with adverse impacts caused by the development and operation of electric power facilities and programs only.

(C) To the extent the program provides for coordination of its measures with additional measures (including additional enhancement measures to deal with impacts caused by factors other than the development and operation of electric power facilities and programs), such additional measures are to be implemented in accordance with agreements among the appropriate parties providing for the administration and funding of such additional measures.

(D) Monetary costs and electric power losses resulting from the implementation of the program shall be allocated by the Administrator consistent with individual project impacts and system-wide objectives of this subsection.

(9) The Council shall adopt such program or amendments thereto within one year after the time provided for receipt of the recommendations. Such program shall also be included in the plan adopted by the Council under subsection (d).

(10)(A) The Administrator shall use the Bonneville Power Administration fund and the authorities available to the Administrator under this Act and other laws administered by the Administrator to protect, mitigate, and enhance fish and wildlife to the extent affected by the development and operation of any hydroelectric project of the Columbia River and its tributaries in a manner consistent with the plan, if in existence, the program adopted by the Council under this subsection, and the purposes of this Act. Expenditures of the Administrator pur-

suant to this paragraph shall be in addition to, not in lieu of, other expenditures authorized or required from other entities under other agreements or provisions of law.

(B) The Administrator may make expenditures from such fund which shall be included in the annual or supplementary budgets submitted to the Congress pursuant to the Federal Columbia River Transmission System Act. Any amounts included in such budget for the construction of capital facilities with an estimated life of greater than 15 years and an estimated cost of at least \$1,000,000 shall be funded in the same manner and in accordance with the same procedures as major transmission facilities under the Federal Columbia River Transmission System Act.

(C) The amounts expended by the Administrator for each activity pursuant to this subsection shall be allocated as appropriate by the Administrator, in consultation with the Corps of Engineers and the Water and Power Resources Service, among the various hydroelectric projects of the Federal Columbia River Power System. Amounts so allocated shall be allocated to the various project purposes in accordance with existing accounting procedures for the Federal Columbia River Power System.

(11)(A) The Administrator and other Federal agencies responsible for managing, operating, or regulating Federal or non-Federal hydroelectric facilities located on the Columbia River or its tributaries shall—

(i) exercise such responsibilities consistent with the purposes of this Act and other applicable laws, to adequately protect, mitigate, and enhance fish and wildlife, including related spawning grounds and habitat, affected by such projects or facilities in a manner that provides equitable treatment for such fish and wildlife with the other purposes for which such system and facilities are managed and operated;

(ii) exercise such responsibilities, taking into account at each relevant stage of decisionmaking processes to the fullest extent practicable, the program adopted by the Council under this subsection. If, and to the extent that, such other Federal agencies as a result of such consideration impose upon any non-Federal electric power project measures to protect, mitigate, and enhance fish and wildlife which are not attributable to the development and operation of such project, then the resulting monetary costs and power losses (if any) shall be borne by the Administrator in accordance with this subsection.

(B) The Administrator and such Federal agencies shall consult with the Secretary of the Interior, the Administrator of the National Marine Fisheries Service, and the State fish and wildlife agencies of the region, appropriate Indian tribes, and affected project operators in carrying out the provisions of this paragraph and shall, to the greatest extent practicable, coordinate their actions.

(12)(A) Beginning on October 1 of the first fiscal year after all members to the Council are appointed initially, the Council shall submit annually a detailed report to the Committee on Energy and Natural Resources of the Senate and to the Committees on Interstate and Foreign Commerce and on Interior and Insular Affairs of the House of Representatives. The report shall describe the actions taken and to be taken by the Council under this Act, including this subsection, the effectiveness of the fish and wildlife program, and potential revisions or modifications to the program to be included in the plan when adopted. At least ninety days prior to its submission of such report, the Council shall make available to such fish and wildlife agencies, and tribes, the Administrator and the customers

a draft of such report. The Council shall establish procedures for timely comments thereon. The Council shall include as an appendix to such report such comments or a summary thereof.

(B) The Administrator shall keep such committees fully and currently informed of the actions taken and to be taken by the Administrator under this Act, including this subsection.

(i) The Council may from time to time review the actions of the Administrator pursuant to sections 4 and 6 of this Act to determine whether such actions are consistent with the plan and programs, the extent to which the plan and programs is being implemented, and to assist the Council in preparing amendments to the plan and programs.

(j)(1) The Council may request the Administrator to take an action under section 6 to carry out the Administrator's responsibilities under the plan.

(2) To the greatest extent practicable within ninety days after the Council's request, the Administrator shall respond to the Council in writing specifying—

(A) the means by which the Administrator will undertake the action or any modification thereof requested by the Council, or

(B) the reasons why such action would not be consistent with the plan, or with the Administrator's legal obligations under this Act, or other provisions of law, which the Administrator shall specifically identify.

(3) If the Administrator determines not to undertake the requested action, the Council, within sixty days after notice of the Administrator's determination, may request the Administrator to hold an informal hearing and make a final decision.

(k)(1) Not later than October 1, 1987, or six years after the Council is established under this Act, whichever is later, the Council shall complete a thorough analysis of conservation measures and conservation resources implemented pursuant to this Act during the five-year period beginning on the date the Council is established under this Act to determine if such measures or resources:

(A) have resulted or are likely to result in costs to consumers in the region greater than the costs of additional generating resources or additional fuel which the Council determines would be necessary in the absence of such measures or resources;

(B) have not been or are likely not to be generally equitable to all consumers in the region; or

(C) have impaired or are likely to impair the ability of the Administrator to carry out his obligations under this Act and other laws, consistent with sound business practices.

(2) The Administrator may determine that section 3(4) (D) shall not apply to any proposed conservation measure or resource if the Administrator finds after receipt of such analysis from the Council that such measure or resource would have any result or effect described in subparagraph (A),(B) or (C) of paragraph (1).

SALE OF POWER

SECTION 5. (a) All power sales under this Act shall be subject at all times to the preference and priority provisions of the Bonneville Project Act of 1937 (16 U.S.C. 832 and following) and, in particular, sections 4 and 5 thereof. Such sales shall be at rates established pursuant to section 7.

(b)(1) Whenever requested, the Administrator shall offer to sell to each requesting public body and cooperative entitled to preference and priority under the Bonneville

Project Act of 1937 and to each requesting investor-owned utility electric power to meet the firm power load of such public body, cooperative or investor-owned utility in the Region to the extent that such firm power load exceeds—

(A) the capability of such entity's firm peaking and energy resources used in the year prior to the enactment of this Act to serve its firm load in the region, and

(B) such other resources as such entity determines, pursuant to contracts under this Act, will be used to serve its firm load in the region.

In determining the resources which are used to serve a firm load, for purposes of subparagraphs (A) and (B), any resources used to serve a firm load under such subparagraphs shall be treated as continuing to be so used, unless such use is discontinued with the consent of the Administrator, or unless such use is discontinued because of obsolescence, retirement, loss of resource, or loss of contract rights.

(2) Contracts with investor-owned utilities shall provide that the Administrator may reduce his obligations under such contracts in accordance with section 5(a) of the Bonneville Project Act of 1937.

(3) In addition to his authorities to sell electric power under paragraph (1), the Administrator is also authorized to sell electric power to Federal agencies in the region.

(4) Sales under this subsection shall be made only if the public body, cooperative, Federal agency or investor-owned utility complies with the Administrator's standards for service in effect on the effective date of this Act or as subsequently revised.

(5) The Administrator shall include in contracts executed in accordance with this subsection provisions that

enable the Administrator to restrict his contractual obligations to meet the loads referred to in this subsection in the future if the Administrator determines, after a reasonable period of experience under this Act, that the Administrator cannot be assured on a planning basis of acquiring sufficient resources to meet such loads during a specified period of insufficiency. Any such contract with a public body, cooperative, or Federal agency shall specify a reasonable minimum period between a notice of restriction and the earliest date such restriction may be imposed.

(6) Contracts executed in accordance with this subsection with public body, cooperative, and Federal agency customers shall—

(A) provide that the restriction referred to in paragraph (5) shall not be applicable to any such customers until the operating year in which the total of such customers' firm loads to be served by the Administrator equals or exceeds the firm capability of the Federal base system resources;

(B) not permit restrictions which would reduce the total contractual entitlement of such customers to an amount less than the firm capability of the Federal base system resources; and

(C) contain a formula for determining annually, on a uniform basis, each such customer's contractual entitlement to firm power during such a period of restriction, which formula shall not consider customer resources other than those the customer has determined, as of the effective date of this Act, to be used to serve its own firm loads.

The formula referred to in subparagraph (C) shall obligate the Administrator to provide on an annual basis only firm power needed to serve the portion of such customer's firm load in excess of the capability of such customer's own firm resources determined by such customer under para-

graph (1) of this subsection to be used to serve its firm load.

(c)(1) Whenever a Pacific Northwest electric utility offers to sell electric power to the Administrator at the average system cost of that utility's resources in each year, the Administrator shall acquire by purchase such power and shall offer, in exchange, to sell an equivalent amount of electric power to such utility for resale to that utility's residential users within the region.

(2) The purchase and exchange sale referred to in paragraph (1) of this subsection with any electric utility shall be limited to an amount not in excess of 50 per centum of such utility's Regional residential load in the year beginning July 1, 1980, such 50 per centum limit increasing in equal annual increments to 100 per centum of such load in the year beginning July 1, 1985, and each year thereafter.

(3) The cost benefits, as specified in contracts with the Administrator, of any purchase and exchange sale referred to in paragraph (1) of this subsection which are attributable to any electric utility's residential load within a State shall be passed through directly to such utility's residential loads within such State, except that a State which lies partially within and partially without the region may require that such cost benefits be distributed among all of the utility's residential loads in that State.

(4) An electric utility may terminate, upon reasonable terms and conditions agreed to by the Administrator and such utility prior to such termination, its purchase and sale under this subsection if the supplemental rate charge provided for in section 7(b)(3) is applied and the cost of electric power sold to such utility under this subsection exceeds, after application of such rate charge, the average system cost of power sold by such utility to the Administrator under this subsection.

(5) Subject to the provisions of sections 4 and 6, in lieu of purchasing any amount of electric power offered by a utility under paragraph (1) of this subsection, the Administrator may acquire an equivalent amount of electric power from other sources to replace power sold to such utility as part of an exchange sale if the cost of such acquisition is less than the cost of purchasing the electric power offered by such utility.

(6) Exchange sales to a utility pursuant to this subsection shall not be restricted below the amounts of electric power acquired by the Administrator from, or on behalf of, such utility pursuant to this subsection.

(7) The "average system cost" for electric power sold to the Administrator under this subsection shall be determined by the Administrator on the basis of a methodology developed for this purpose in consultation with the Council, the Administrator's customers, and appropriate State regulatory bodies in the region. Such methodology shall be subject to review and approval by the Federal Energy Regulatory Commission. Such average system cost shall not include—

(A) the cost of additional resources in an amount sufficient to serve any new large single load of the utility;

(B) the cost of additional resources in an amount sufficient to meet any additional load outside the region occurring after the effective date of this Act; and

(C) any costs of any generating facility which is terminated prior to initial commercial operation.

(d)(1)(A) The Administrator is authorized to sell in accordance with this subsection electric power to existing direct service industrial customers. Such sales shall provide a portion of the Administrator's reserves for firm power loads within the region.

(B) After the effective date of this Act, the Administrator shall offer in accordance with subsection (g) of this section to each existing direct service industrial customer an initial long term contract that provides such customer an amount of power equivalent to that to which such customer is entitled under its contract dated January or April 1975 providing for the sale of "industrial firm power."

(2) The Administrator shall not sell electric power, including reserves, directly to new direct service industrial customers.

(3) The Administrator shall not sell amounts of electric power, including reserves, to existing direct service industrial customers in excess of the amount permitted under paragraph (1) unless the Administrator determines, after a plan has been adopted pursuant to section 4 of this Act, that such proposed sale is consistent with the plan and that—

(A) additional power system reserves are required for the region's firm loads,

(B) the proposed sale would provide a cost-effective method of supplying such reserves,

(C) such loads or loads of similar character cannot provide equivalent operating or planning benefits to the region if served by an electric utility under contractual arrangements providing reserves, and

(D) the Administrator has or can acquire sufficient electric power to serve such loads, and

unless the Council has determined such sale is consistent with the plan. After such determination by the Administrator and by the Council, the Administrator is authorized to offer to existing direct service industrial customers power in such amounts in excess of the amount permitted under paragraph (1) of this subsection as the Administrator determines to be necessary to provide additional power system reserves to meet the region's firm loads.

(4)(A) As used in this section, the term "existing direct service industrial customer" means any direct service industrial customer of the Administrator which has a contract for the purchase of electric power from the Administrator on the effective date of this Act.

(B) The term "new direct service industrial customer" means any industrial entity other than an existing direct service industrial customer.

(C)(i) Where a new contract is offered in accordance with subsection (g) to any existing direct service industrial customer which has not received electric power prior to the effective date of this Act from the Administrator pursuant to a contract with the Administrator existing on the date of the enactment of this Act, electric power delivered under such new contract shall be conditioned on the Administrator reasonably acquiring, in accordance with this Act and within such estimated period of time (as specified in the contract) as he deems reasonable, sufficient resources to meet, on a planning basis, the load requirement of such customer. Such contract shall also provide that the obligation of the Administrator to acquire such resources to meet such load requirement shall, except as provided in clause (ii) of this subparagraph, apply only to such customer and shall not be sold or exchanged by such customer to any other person.

(ii) Rights under a contract described in clause (i) of this subparagraph may be transferred by an existing direct service industrial customer referred to in clause (i) to a successor in interest in connection with a reorganization or other transfer of all major assets of such customer. Following such a transfer, such successor in interest (or any other subsequent successor in interest) may also transfer rights under such a contract only in connection with a reorganization or other transfer of all assets of such successor in interest.

(iii) The limitations of clause (i) of this subparagraph shall not apply to any customer referred to in clause (i) whenever the Administrator determines that such customer is receiving electric power pursuant to a contract referred to in such clause (ii).

(e)(1) The contractual entitlement to firm power of any customer from whom, or on whose behalf, the Administrator has acquired electric power pursuant to section 6 may not be restricted below the amount of electric power so acquired from, or on behalf of, such customer. If in any year such customer's requirements are less than such entitlement, any excess of such entitlement shall be first made available to increase the entitlement of other customers of the same class before being available for the entitlement of other customers. For purposes of this paragraph, the following entities shall each constitute a class:

- (A) public bodies and cooperatives;
- (B) Federal agencies;
- (C) direct service industrial; and
- (D) investor owned utilities.

(2) Any contractual entitlement to firm power which is based on electric power acquired from, or on behalf of, a customer pursuant to section 6 shall be in addition to any other contractual entitlement to firm power not subject to restriction that such customer may have under this section. For the purposes of this subsection, references to amounts of power acquired by the Administrator pursuant to section 6 shall be deemed to mean the amounts specified in the resource acquisition contracts exclusive of any amounts recognized in such contracts as replacement for Federal base system resources.

(3) The Administrator shall, consistent with the provisions of this Act, insure that any restrictions upon any particular customer class made pursuant to this subsection and subsection (b) of this section are distributed equitably throughout the region.

(f) The Administrator is authorized to sell, or otherwise dispose of, electric power acquired pursuant to this and other Acts, that is surplus to his obligations incurred pursuant to subsections (b), (c), and (d) of this section in accordance with this and other Acts applicable to the Administrator, including the Bonneville Project Act of 1937 (16 U.S.C. 832 and following), the Federal Columbia River Transmission System Act (16 U.S.C. 838 and following), and the Act of August 31, 1964 (16 U.S.C. 837-837h).

(g)(1) As soon as practicable within nine months after the effective date of this Act, the Administrator shall commence necessary negotiations for, and offer, initial long-term contracts (within the limitations of the third sentence of section 5(a) of the Bonneville Project Act) simultaneously to—

(A) existing public body and cooperative customers and investor-owned utility customers under subsection (b) of this section;

(B) Federal agency customers under subsection (b) of this section;

(C) electric utility customers under subsection (c) of this section; and

(D) direct service industrial customers under subsection (d)(1).

(2) Each customer offered a contract pursuant to this subsection shall have one year from the date of such offer to accept such contract. Such contract shall be effective as provided in this subsection.

(3) An initial contract with a public body, cooperative or investor-owned electric utility customer or a Federal agency customer pursuant to subsection (b) of this section shall be effective on the date executed by such customer, unless another effective date is otherwise agreed to by the Administrator and the customer.

(4) An initial contract with an electric utility customer pursuant to subsection (c) of this section shall be effective on the date executed by such customer, but no earlier than the first day of the tenth month after the effective date of this Act.

(5) An initial contract with a direct service industrial customer pursuant to subsection (d)(1), shall be effective on the date agreed upon by the Administrator and such customer, but no later than the first day of the tenth month after the effective date of this Act. When such contract is executed, it may for rate purposes be given retroactive effect to such first day.

(6) Initial contracts offered public body, cooperative and Federal agency customers in accordance with this subsection shall provide that during a period of insufficiency declared in accordance with subsection (b) of this section each customer's contractual entitlement shall, to the extent of its requirements on the Administrator, be no less than the amount of firm power received from the Administrator in the year immediately preceding the period of insufficiency.

(7) The Administrator shall be deemed to have sufficient resources for the purpose of entering into the initial contracts specified in paragraph (1)(A) through (D).

CONSERVATION AND RESOURCE ACQUISITION

SECTION 6. (a)(1) The Administrator shall acquire such resources through conservation, implement all such conservation measures, and acquire such renewable resources which are installed by a residential or small commercial consumer to reduce load, as the Administrator determines are consistent with the plan, or if no plan is in effect with the criteria of section 4(e)(1) and the considerations of section 4(e)(2) and, in the case of major resources, in accordance with subsection (c) of this section. Such con-

servation measures and such resources may include, but are not limited to—

(A) loans and grants to consumers for insulation or weatherization, increased system efficiency, and waste energy recovery by direct application,

(B) technical and financial assistance to, and other cooperation with, the Administrator's customers and governmental authorities to encourage maximum cost-effective voluntary conservation and the attainment of any cost-effective conservation objectives adopted by individual States or subdivisions thereof,

(C) aiding the Administrator's customers and governmental authorities in implementing model conservation standards adopted pursuant to section 4(f), and

(D) conducting demonstration projects to determine the cost effectiveness of conservation measures and direct application of renewable energy resources.

(2) In addition to acquiring electric power pursuant to section 5(c), or on a short-term basis pursuant to section 11(b)(6)(i) of the Federal Columbia River Transmission System Act, the Administrator shall acquire, in accordance with this section, sufficient resources—

(A) to meet his contractual obligations that remain after taking into account planned savings from measures provided for in paragraph (1) of this subsection, and

(B) to assist in meeting the requirements of section 4(h) of this Act.

The Administrator shall acquire such resources without considering restrictions which may apply pursuant to section 5(b) of this Act.

(b)(1) Except as specifically provided in this section, acquisition of resources under this Act shall be consistent with the plan, as determined by the Administrator.

(2) The Administrator may acquire resources (other than major resources) under this Act which are not consistent with the plan, but which are determined by the Administrator to be consistent with the criteria of section 4(e)(1) and the considerations of section 4(e)(2) of this Act.

(3) If no plan is in effect, the Administrator may acquire resources under this Act which are determined by the Administrator to be consistent with the criteria of section 4(e)(1) and the considerations of section 4(e)(2) of this Act.

(4) The Administrator shall acquire any non-Federal resources to replace Federal base system resources only in accordance with the provisions of this section. The Administrator shall include in the contracts for the acquisition of any such non-Federal replacement resources provisions which will enable him to ensure that such non-Federal replacement resources are developed and operated in a manner consistent with the considerations specified in section 4(e)(2) of this Act.

(5) Notwithstanding any acquisition of resources pursuant to this section, the Administrator shall not reduce his efforts to achieve conservation and to acquire renewable resources installed by a residential or small commercial consumer to reduce load, pursuant to subsection (a)(1) of this section.

(c)(1) For each proposal under subsection (a), (b), (f), (h), or (l) of this section to acquire a major resource, to implement a conservation measure which will conserve an amount of electric power equivalent to that of a major resource, to pay or reimburse investigation and preconstruction expenses of the sponsors of a major resource, or to grant billing credits or services involving a major resource, the Administrator shall—

(A) publish notice of the proposed action in the Federal Register and provide a copy of such notice to

the Council, the Governor of each State in which facilities would be constructed or a conservation measure implemented, and the Administrator's customers;

(B) not less than sixty days following publication of such notice, conduct one or more public hearings, presided over by a hearing officer, at which testimony and evidence shall be received, with opportunity for such rebuttal and cross-examination as the hearing officer deems appropriate in the development of an adequate hearing record;

(C) develop a record to assist in evaluating the proposal which shall include the transcript of the public hearings, together with exhibits, and such other materials and information as may have been submitted to, or developed by, the Administrator; and

(D) following completion of such hearings, promptly provide to the Council and make public a written decision that includes, in addition to a determination respecting the requirements of subsection (a), (b), (f), (h), (l), or (m) of this section, as appropriate—

(i) if a plan is in effect, a finding that the proposal is either consistent or inconsistent with the plan or, notwithstanding its inconsistency with the plan, a finding that it is needed to meet the Administrator's obligations under this Act, or

(ii) if no plan is in effect, a finding that the proposal is either consistent or inconsistent with the criteria of section 4(e)(1) and the considerations of section 4(e)(2) of this Act or notwithstanding its inconsistency, a finding that it is needed to meet the Administrator's obligations under this Act.

In the case of subsection (f) of this section, such decision shall be treated as satisfying the applicable requirements of this subsection and of subsection (f) of this section, if it includes a finding of probable consistency, based upon the Administrator's evaluation of

information available at the time of completion of the hearing under this paragraph. Such decision shall include the reasons for such finding.

(2) Within sixty days of the receipt of the Administrator's decision pursuant to paragraph (1)(D) of this subsection, the Council may determine by a majority vote of all members of the Council, and notify the Administrator—

(A) that the proposal is either consistent or inconsistent with the plan, or

(B) if no plan is in effect, that the proposal is either consistent or inconsistent with the criteria of section 4(e)(1) and the considerations of section 4(e)(2).

(3) The Administrator may not implement any proposal referred to in paragraph (1) that is determined pursuant to paragraph (1) or (2) by either the Administrator or the Council to be inconsistent with the plan or, if no plan is in effect, with the criteria of section 4(e)(1) and the considerations of section 4(e)(2)—

(A) unless the Administrator finds that, notwithstanding such inconsistency, such resource is needed to meet the Administrator's obligations under this Act, and

(B) until the expenditure of funds for that purpose has been specifically authorized by Act of Congress enacted after the date of the enactment of this Act.

(4) Before the Administrator implements any proposal referred to in paragraph (1) of this subsection, the Administrator shall—

(A) submit to the appropriate committees of the Congress the administrative record of the decision (including any determination by the Council under paragraph (2)) and a statement of the procedures followed or to be followed for compliance with the National Environmental Policy Act of 1969,

(B) publish notice of the decision in the Federal Register, and

(C) note the proposal in the Administrator's annual or supplementary budget submittal made pursuant to the Federal Columbia River Transmission System Act (16 U.S.C. 838 and following).

The Administrator may not implement any such proposal until ninety days after the date on which such proposal has been noted in such budget or after the date on which such decision has been published in the Federal Register, whichever is later.

(5) The authority of the Council to make a determination under paragraph (2)(B) if no plan is in effect shall expire on the date two years after the establishment of the Council.

(d) The Administrator is authorized to acquire a resource, other than a major resource, whether or not such resource meets the criteria of section 4(e)(1) and the considerations of section 4(e)(2) but which he determines is an experimental, developmental, demonstration, or pilot project of a type with a potential for providing cost-effective service to the region. The Administrator shall make no obligation for the acquisition of such resource until it is included in the annual budgets submitted to the Congress pursuant to the Federal Columbia River Transmission System Act.

(e)(1) In order to effectuate the priority given to conservation measures and renewable resources under this Act, the Administrator shall, to the maximum extent practicable, make use of his authorities under this Act to acquire conservation measures and renewable resources, to implement conservation measures, and to provide credits and technical and financial assistance for the development and implementation of such resources and measures (including the funding of, and the securing of debt for, ex-

penses incurred during the investigation and preconstruction of resources, as authorized in subsection (f) of this section).

(2) To the extent conservation measures or acquisition of resources require direct arrangements with consumers, the Administrator shall make maximum practicable use of customers and local entities capable of administering and carrying out such arrangements.

(f)(1) For resources which the Administrator determines may be eligible for acquisition under this section and satisfy the criteria of section 4(e)(1) and the considerations of section 4(e)(2) of this Act or, if a plan is in effect, to be consistent with the plan, the Administrator is authorized to enter into agreements with sponsors of—

(A) a renewable resource, other than a major resource, to fund or secure debt incurred in the investigation and initial development of such resource, or

(B) any other resource to provide for the reimbursement of the sponsor's investigation and preconstruction expenses concerning such resource (which expenses shall not include procurement of capital equipment or construction material for such resource).

In the case of any resource referred to in subparagraph (B) of this paragraph, such reimbursement is authorized only if—

(i) such resource is subsequently denied State siting approval or other necessary Federal or State permits, or approvals,

(ii) such investigation subsequently demonstrates, as determined by the Administrator, that such resource does not meet the criteria of section 4(e)(1) and the considerations of section 4(e)(2) of this Act or is not acceptable because of environmental impacts, or

(iii) after such investigation the Administrator determines not to acquire the resource and the sponsor determines not to construct the resource.

(2) The Administrator may exercise the authority of this subsection only after he determines that the failure to do so would result in inequitable hardship to the consumers of such sponsors. The Administrator may provide reimbursement under this subsection only for expenses incurred after the date of the enactment of this Act.

(3) Any agreement under paragraph (1) of this subsection shall provide the Administrator an option to acquire any such resource, including a renewable resource, and shall include such other provisions, as the Administrator deems appropriate, for the Administrator's recovery from such sponsors or any assignee of the sponsors, if such sponsor or assignee continues development of the resource, of any advances made by the Administrator pursuant to such agreement.

(4) The Administrator shall not reimburse any expense incurred by the sponsors (except necessary expenses involved in the liquidation of the resource) after the date of a final denial of application for State siting approval or after the date the Administrator determines that the resource to be inconsistent with the plan or the criteria of section 4(e)(1) and the considerations of section 4(e)(2).

(g) At the request of the appropriate State, any environmental impact statement which may be required with respect to a resource, to the extent determined possible by the Administrator in accordance with applicable law and regulations, may be prepared jointly and in coordination with any required environmental impact statement of the State or any other statement which serves the purpose of an environmental impact statement which is required by State law.

(h)(1) If a customer so requests, the Administrator shall grant billing credits to such customer, and provide services to such customer at rates established for such services, for—

(A) conservation activities independently undertaken or continued after the effective date of this Act by such customer or political subdivision served by such customer which reduce the obligation of the Administrator that would otherwise have existed to acquire other resources under this Act, or

(B) resources constructed, completed, or acquired after the effective date of this Act by a customer, an entity acting on behalf of such customer, or political subdivision served by the customer which reduce the obligation of the Administrator to acquire resources under this Act. Such resources shall be renewable resources or multipurpose projects or other resources which are not inconsistent with the plan or, in the absence of a plan, not inconsistent with the criteria of section 4(e)(1) and the considerations of section 4(e)(2) of this Act.

(2) The energy and capacity on which a credit under this subsection to a customer is based shall be the amount by which a conservation activity or resource actually changes the customer's net requirement for supply of electric power or reserves from the Administrator.

(3) The amount of credits for conservation under this subsection shall be set to credit the customer implementing or continuing the conservation activity for which the credit is granted for the savings resulting from such activity. The rate impact on the Administrator's other customers of granting the credit shall be equal to the rate impact such customers would have experienced had the Administrator been obligated to acquire resources in an amount equal to that actually saved by the activity for which the credit is granted.

(4) For resources other than conservation, the customer shall be credited for net costs actually incurred by such customer, an entity acting on behalf of such customer, or political subdivision served by such customer, in acquiring, constructing, or operating the resource for which the credit is granted. The rate impact to the Administrator's other customers of granting the credit shall be no greater than the rate impact such customers would have experienced had the Administrator been obligated to acquire resources in an amount equal to that actually produced by the resource for which the credit is granted.

(5) Retail rate structures which are voluntarily implemented by the Administrator's customers and which induce conservation or installation of consumer-owned renewable resources shall be considered, for purposes of this subsection, to be (A) conservation activities independently undertaken or carried on by such customers, or (B) customer-owned renewable resources, and shall qualify for billing credits upon the same showing as that required for other conservation or renewable resource activities.

(6) Prior to granting any credit or providing services pursuant to this subsection, the Administrator shall—

(A) comply with the notice provisions of subsection (c) of this section, and include in such notice the methodology the Administrator proposes to use in determining the amount of any such credit;

(B) include the cost of such credit in the Administrator's annual or amended budget submittal to the Congress made pursuant to the Federal Columbia River Transmission System Act (16 U.S.C. 838(j));

(C) require that resources in excess of customer's reasonable load growth shall have been offered to others for ownership, participation or other sponsorship pursuant to subsection (m) of this section, except in the case of conservation, multi-purpose projects

uniquely suitable for development by the customer, or renewable resources; and

(D) require that the operators of any generating resource for which a billing credit is to be granted agree to operate such resource in a manner compatible with the planning and operation of the region's power system.

(i) Contracts for the acquisition of resources and for billing credits for major resources, including conservation activities, entered into pursuant to this section shall contain such terms and conditions, applicable after the contract is entered into, as will—

(1) insure timely construction, scheduling, completion, and operation of resources,

(2) insure that the costs of any acquisition are as low as reasonably possible, consistent (A) with sound engineering, operating, and safety practices, and (B) the protection, mitigation, and enhancement of fish and wildlife, including related spawning grounds and habitat affected by the development of such resources, and

(3) insure that the Administrator exercises effective oversight, inspection, audit, and review of all aspects of such construction and operation.

Such contracts shall contain provisions assuring that the Administrator has the authority to approve all costs of, and proposals for, major modifications in construction, scheduling or operations and to assure that the Administrator is provided with such current information as he deems necessary to evaluate such construction and operation.

(j)(1) All contractual and other obligations required to be carried out by the Administrator pursuant to this Act shall be secured solely by the Administrator's revenues received from the sale of electric power and other services.

Such obligations are not, nor shall they be construed to be, general obligations of the United States, nor are such obligations intended to be or are they secured by the full faith and credit of the United States.

(2) All contracts entered into by the Administrator for the acquisition of resources pursuant to this Act shall require that, in the sale of any obligations, all offerings and promotional material for the sale of such obligations shall include the language contained in the second sentence of paragraph (1) of this subsection. The Administrator shall monitor and enforce such requirement.

(k) In the exercise of his authorities pursuant to this section, the Administrator shall, consistent with the provisions of this Act and the Administrator's obligations to particular customer classes, insure that benefits under this section, including financial and technical assistance, conduct of conservation demonstrations, and experimental projects, services, and billing credits, are distributed equitably throughout the region.

(1)(1) The Administrator is authorized and directed to investigate opportunities for adding to the region's resources or reducing the region's power costs through the accelerated or cooperative development of resources located outside the States of Idaho, Montana, Oregon, and Washington if such resources are renewable resources, and are now or in the future planned or considered for eventual development by nonregional agencies or authorities that will or would own, sponsor, or otherwise develop them. The Administrator shall keep the Council fully and currently informed of such investigations, and seek the Council's advice as to the desirability of pursuing such investigations.

(2) The Administrator is authorized and directed to investigate periodically opportunities for mutually beneficial interregional exchanges of electric power that reduce the need for additional generation or generating capacity in

the Pacific Northwest and the regions with which such exchanges may occur. The Council shall take into consideration in formulating a plan such investigations.

(3) After the Administrator submits a report to Congress pursuant to paragraph (5) of this subsection, the Administrator is authorized to acquire resources consistent with such investigations and consistent with the plan or, if no plan is in effect, with the priorities of section 4(e)(1) and the considerations of section 4(e)(2). Such acquisitions shall be in accordance with the provisions of this subsection.

(4) The Administrator shall conduct the investigations and the acquisitions, if any, authorized under this subsection with the assistance of other Federal agencies as may be appropriate.

(5) No later than July 1, 1981, the Administrator shall submit to the Congress a report of the results of the investigations undertaken pursuant to this subsection, together with the prospects for obtaining additional resources under the authority granted by this subsection and for reductions in generation or generating capacity through exchanges.

(m) Except as to resources under construction on the effective date of this Act, the Administrator shall determine in each case of a major resource acquisition that a reasonable share of the particular resource, or a reasonable equivalent, has been offered to each Pacific Northwest electric utility for ownership, participation, or other sponsorship, but not in excess of the amounts needed to meet such utility's Regional load.

RATES

SECTION 7. (a)(1) The Administrator shall establish, and periodically review and revise, rates for the sale and disposition of electric energy and capacity and for the transmission of non-Federal power. Such rates shall be

established and, as appropriate, revised to recover, in accordance with sound business principles, the costs associated with the acquisition, conservation, and transmission of electric power, including the amortization of the Federal investment in the Federal Columbia River Power System (including irrigation costs required to be repaid out of power revenues) over a reasonable period of years and the other costs and expenses incurred by the Administrator pursuant to this Act and other provisions of law. Such rates shall be established in accordance with sections 9 and 10 of the Federal Columbia River Transmission System Act (16 U.S.C. 838), section 5 of the Flood Control Act of 1944, and the provisions of this Act.

(2) Rates established under this section shall become effective only, except in the case of interim rules as provided in subsection (i) (6), upon confirmation and approval by the Federal Energy Regulatory Commission upon a finding by the Commission, that such rates—

(A) are sufficient to assure repayment of the Federal investment in the Federal Columbia River Power System over a reasonable number of years after first meeting the Administrator's other costs.

(B) are based upon the Administrator's total system costs, and

(C) insofar as transmission rates are concerned, equitably allocate the costs of the Federal transmission system between Federal and non-Federal power utilizing such system.

(b)(1) The Administrator shall establish a rate or rates of general application for electric power sold to meet the general requirements of public body, cooperative, and Federal agency customers within the Pacific Northwest, and loads of electric utilities under section 5(c). Such rate or rates shall recover the costs of that portion of the Federal base system resources needed to supply such loads until such sales exceed the Federal base system resources. There-

after, such rate or rates shall recover the cost of additional electric power as needed to supply such loads, first from the electric power acquired by the Administrator under section 5(c) and then from other resources.

(2) After July 1, 1985, the projected amounts to be charged for firm power for the combined general requirements of public body, cooperative and Federal agency customers, exclusive of amounts charged such customers under subsection (g) for the costs of conservation, resource and conservation credits, experimental resources and uncontrollable events, may not exceed in total, as determined by the Administrator, during any year after July 1, 1985, plus the ensuing four years, an amount equal to the power costs for general requirements of such customers if, the Administrator assumes that—

(A) the public body and cooperative customers' general requirements had included during such five-year period the direct service industrial customer loads which are—

(i) served by the Administrator, and

(ii) located within or adjacent to the geographic service boundaries of such public bodies and cooperatives;

(B) public body, cooperative, and Federal agency customers were served, during such five-year period, with Federal base system resources not obligated to other entities under contracts existing as of the effective date of this Act (during the remaining term of such contracts) excluding obligations to direct service industrial customer loads included in subparagraph (A) of this paragraph;

(C) no purchases or sales by the Administrator as provided in section 5(c) were made during such five-year period;

(D) all resources that would have been required, during such five-year period, to meet remaining gen-

eral requirements of the public body, cooperative and Federal agency customers (other than requirements met by the available Federal base system resources determined under subparagraph (B) of this paragraph) were—

(i) purchased from such customers by the Administrator pursuant to section 6, or

(ii) not committed to load pursuant to section 5(b),

and were the least expensive resources owned or purchased by public bodies or cooperatives; and any additional needed resources were obtained at the average cost of all other new resources acquired by the Administrator; and

(E) the quantifiable monetary savings, during such five-year period, to public body, cooperative and Federal agency customers resulting from—

(i) reduced public body and cooperative financing costs as applied to the total amount of resources, other than Federal base system resources, identified under subparagraph (D) of this paragraph, and

(ii) reserve benefits as a result of the Administrator's actions under this Act

were not achieved.

(3) Any amounts not charged to public body, cooperative, and Federal agency customers by reason of paragraph (2) of this subsection shall be recovered through supplemental rate charges for all other power sold by the Administrator to all customers. Rates charged public body, cooperative, or Federal agency customers pursuant to this subsection shall not include any costs or benefits of a net revenue surplus or deficiency occurring for the period ending June 30, 1985, to the extent such surplus or deficiency is caused by—

(A) a difference between actual power deliveries and power deliveries projected for the purpose of

establishing rates to direct service industrial customers under subsection (c)(1) of this subsection, and

(B) an overrecovery or underrecovery of the net costs incurred by the Administrator under section 5(c) as a result of such difference.

Any such revenue surplus or deficiency incurred shall be recovered from, or repaid to, customers over a reasonable period of time after July 1, 1985, through a supplemental rate charge or credit applied proportionately for all other power sold by the Administrator at rates established under other subsections of this section prior to July 1, 1985.

(4) The term "general requirements" as used in this section means the public body, cooperative or Federal agency customer's electric power purchased from the Administrator under section 5(b) of this Act, exclusive of any new large single load.

(c)(1) The rate or rates applicable to direct service industrial customers shall be established—

(A) for the period prior to July 1, 1985, at a level which the Administrator estimates will be sufficient to recover the cost of resources the Administrator determines are required to serve such customers' load and the net costs incurred by the Administrator pursuant to section 5(c) of this Act, based upon the Administrator's projected ability to make power available to such customers pursuant to their contracts, to the extent that such costs are not recovered through rates applicable to other customers; and

(B) for the period beginning July 1, 1985, at a level which the Administrator determines to be equitable in relation to the retail rates charged by the public body and cooperative customers to their industrial consumers in the region.

(2) The determination under paragraph (1)(B) of this subsection shall be based upon the Administrator's appli-

cable wholesale rates to such public body and cooperative customers and the typical margins included by such public body and cooperative customers in their retail industrial rates but shall take into account—

(A) the comparative size and character of the loads served,

(B) the relative costs of electric capacity, energy, transmission, and related delivery facilities provided and other service provisions, and

(C) direct and indirect overhead costs,

all as related to the delivery of power to industrial customers, except that the Administrator's rates during such period shall in no event be less than the rates in effect for the contract year ending on June 30, 1985.

(3) The Administrator shall adjust such rates to take into account the value of power system reserves made available to the Administrator through his rights to interrupt or curtail services to such direct service industrial customers.

(d)(1) In order to avoid adverse impacts on retail rates of the Administrator's customers with low system densities, the Administrator shall, to the extent appropriate, apply discounts to the rate or rates for such customers.

(2) In order to avoid adverse impacts of increased rates pursuant to this Act on any direct service industrial customer using raw minerals indigenous to the region as its primary resource, the Administrator, upon request of such customer showing such impacts and after considering the effect of such request on his other obligations under this Act, is authorized, if the Administrator determines that such impacts will be significant, to establish a special rate applicable to such customer if all power sold to such customer may be interrupted, curtailed, or withdrawn to meet firm loads in the region. Such rate shall be established in

accordance with this section and shall include such terms and conditions as the Administrator deems appropriate.

(e) Nothing in this Act prohibits the Administrator from establishing, in rate schedules of general application, a uniform rate or rates for sale of peaking capacity or from establishing time-of-day, seasonal rates, or other rate forms.

(f) Rates for all other firm power sold by the Administrator for use in the Pacific Northwest shall be based upon the cost of the portions of Federal base system resources, purchases of power under section 5(c) of this Act and additional resources which, in the determination of the Administrator, are applicable to such sales.

(g) Except to the extent that the allocation of costs and benefits is governed by provisions of law in effect on the effective date of this Act, or by other provisions of this section, the Administrator shall equitably allocate to power rates, in accordance with generally accepted ratemaking principles and the provisions of this Act, all costs and benefits not otherwise allocated under this section, including, but not limited to, conservation, fish and wildlife measures, uncontrollable events, reserves, the excess costs of experimental resources acquired under section 6, the cost of credits granted pursuant to section 6, operating services, and the sale of or inability to sell excess electric power.

(h) Notwithstanding any other provision of this section (except the provisions of subsection (a) of this section), the Administrator shall adjust power rates to include any surcharges arising under section 4(f) of this Act, and shall allocate any revenues from such charges in such manner as the Administrator determines will help achieve the purposes of section 4(f) of this Act.

(i) In establishing rates under this section, the Administrator shall use the following procedures:

(1) Notice of the proposed rates shall be published in the Federal Register with a statement of the justification and reasons supporting such rates. Such notice

shall include a date for a hearing in accordance with paragraph (2) of this subsection.

(2) One or more hearings shall be conducted as expeditiously as practicable by a hearing officer to develop a full and complete record and to receive public comment in the form of written and oral presentation of views, data, questions, and argument related to such proposed rates. In any such hearing—

(A) any person shall be provided an adequate opportunity by the hearing officer to offer refutation or rebuttal of any material submitted by any other person or the Administrator, and

(B) the hearing officer, in his discretion, shall allow a reasonable opportunity for cross examination, which, as determined by the hearing officer, is not dilatory, in order to develop information and material relevant to any such proposed rate.

(3) In addition to the opportunity to submit oral and written material at the hearings, any written views, data, questions, and arguments submitted by persons prior to, or before the close of, hearings shall be made a part of the administrative record.

(4) After such a hearing, the Administrator may propose revised rates, publish such proposed rates in the Federal Register, and conduct additional hearings in accordance with this subsection.

(5) The Administrator shall make a final decision establishing a rate or rates based on the record which shall include the hearing transcript, together with exhibits, and such other materials and information as may have been submitted to, or developed by, the Administrator. The decision shall include a full and complete justification of the final rates pursuant to this section.

(6) The final decision of the Administrator shall become effective on confirmation and approval of such rates by the Federal Energy Regulatory Commission

pursuant to subsection (a)(2) of this section. The Commission shall have the authority, in accordance with such procedures, if any, as the Commission shall promptly establish and make effective within one year after the enactment of this Act, to approve the final rate submitted by the Administrator on an interim basis, pending the Commission's final decision in accordance with such subsection. Pending the establishment of such procedures by the Commission, if such procedures are required, the Secretary is authorized to approve such interim rates during such one-year period in accordance with the applicable procedures followed by the Secretary prior to the effective date of this Act. Such interim rates, at the discretion of the Secretary, shall continue in effect until July 1, 1982.

(j) All rate schedules adopted, and all power billings rendered, by the Administrator pursuant to this section shall indicate—

(1) the approximate cost contribution of different resource categories to the Administrator's rates for the sale of energy and capacity, and

(2) the cost of resources acquired to meet load growth within the region and the relation of such cost to the average cost of resources available to the Administrator.

(k) Notwithstanding any other provision of this Act, all rates or rate schedules for the sale of nonfirm electric power within the United States, but outside the region, shall be established after the date of this Act by the Administrator in accordance with the procedures of subsection (i) of this section (other than the first sentence of paragraph (6) thereof) and in accordance with the Bonneville Project Act, the Flood Control Act of 1944, and the Federal Columbia River Transmission System Act. Notwithstanding section 201(f) of the Federal Power Act, such rates or rate schedules shall become effective after review by the Federal

Energy Regulatory Commission for conformance with the requirements of such Acts and after approval thereof by the Commission. Such review shall be based on the record of proceedings established under subsection (i) of this section. The parties to such proceedings under subsection (i) shall be afforded an opportunity by the Commission for an additional hearing in accordance with the procedures established for ratemaking by the Commission pursuant to the Federal Power Act.

(l) In order to further the purposes of this Act and to protect the consumers of the region, the Administrator may negotiate, or establish, rates for electric power sold by the Administrator to any entity not located in the United States which shall be equitable in relation to rates for all electric power which is, or may be, purchased by the Administrator or the Administrator's customers from entities outside the United States. In establishing rates other than by negotiation, the provisions of subsection (i) shall apply. In the case of any negotiation with an entity not located in the United States, the Administrator shall provide public notice of any proposal to negotiate such rates. Such negotiated rates shall be not less than the rates established under this Act for nonfirm power sold within the United States but outside the region. The Administrator shall also afford notice of any rates negotiated pursuant to this subsection.

(m)(1) Beginning the first fiscal year after the plan and program required by section 4(d) and (h) of this Act are finally adopted, the Administrator may, subject to the provisions of this section, make annual impact aid payments to the appropriate local governments within the region with respect to major transmission facilities of the Administrator, as defined in section 3(c) of the Federal Columbia River Transmission Act—

(A) which are located within the jurisdictional boundaries of such governments,

(B) which are determined by the Administrator to have a substantial impact on such governments, and

(C) where the construction of such facilities, or any modification thereof, is completed after the effective date of this Act, and, in the case of a modification of an existing facility, such modification substantially increases the capacity of such existing transmission facility.

(2) Payments made under this subsection for any fiscal year shall be determined by the Administrator pursuant to a regionwide, uniform formula to be established by rule in accordance with the procedures set forth in subsection (i) of this section. Such rule shall become effective on its approval, after considering its effect on rates established pursuant to this section, by the Federal Energy Regulatory Commission. In developing such formula, the Administrator shall identify, and take into account, the local governmental services provided to the Administrator concerning such facilities and the associated costs to such governments as the result of such facilities.

(3) Payments made pursuant to this subsection shall be made solely from the fund established by section 11 of the Federal Columbia River Transmission System Act. The provisions of section 13 of such Act, and any appropriations provided to the Administrator under any law, shall not be available for such payments. The authorization of payments under this subsection shall not be construed as an obligation of the United States.

(4) No payment may be made under this subsection with respect to any land or interests in land owned by the United States within the region and administered by any Federal agency (other than the Administrator), without regard to how the United States obtained ownership thereof, including lands or interests therein acquired or withdrawn by a Federal agency for purposes of such agency

and subsequently made available to the Administrator for such facilities.

AMENDMENTS TO EXISTING LAW

SECTION 8. (a) Section 11(b) of the Federal Columbia River Transmission System Act is amended by striking out "or" before "(iii)" in paragraph (6), by striking out the semicolon at the end of such paragraph (6) and inserting in lieu thereof ", or (iv) on a short term basis to meet the Administrator's obligations under section 4(h) of the Pacific Northwest Electric Power Planning and Conservation Act;".

(b) Section 11(b) of the Federal Columbia River Transmission System Act is amended by striking out "and" at the end of paragraph (10), by striking out the period at the end of paragraph (11) and inserting in lieu thereof "; and ", and by adding at the end thereof the following new paragraph:

"(12) making such payments, as shall be required to carry out the purposes and provisions of the Pacific Northwest Electric Power Planning and Conservation Act".

(c) Subsection (b) of section 13 of such Act is amended by striking out "and 11(b)(11)" and inserting in lieu thereof ", 11(b)(11), and 11(b)(12)".

(d)(1) The first sentence of subsection (a) of section 13 of such Act is amended by inserting after the word "system," the following: "to implement the Administrator's authority pursuant to the Pacific Northwest Electric Power Planning and Conservation Act (including his authority to provide financial assistance for conservation measures, renewable resources, and fish and wildlife, but not including the authority to acquire under section 6 of that Act electric power from a generating facility having a planned capability greater than 50 average megawatts);".

(2) The fourth sentence of such subsection (a) is amended by inserting the following before the period at the end thereof: "issued by Government corporations".

(3) Such subsection (a) is further amended by inserting the following before the period at the end thereof: "prior to October 1, 1981. Such aggregate principal limitation shall be increased by an additional \$1,250,000,000 after October 1, 1981, as provided in advance in annual appropriation Acts, and such increased amount shall be reserved for the purpose of providing funds for conservation and renewable resource loans and grants in a special revolving account created therefor in the Fund. The funds from such revolving account shall not be deemed State or local funds".

(4) Such subsection (a) is further amended by inserting the following after the fourth sentence thereof: "Beginning in fiscal year 1982, if the Administrator fails to repay by the end of any fiscal year all of the amounts projected immediately prior to such year to be repaid to the Treasury by the end of such year under the repayment criteria of the Secretary of Energy and if such failure is due to reasons other than (A) a decrease in power sale revenues due to fluctuating streamflows or (M) other reasons beyond the control of the Administrator, the Secretary of the Treasury may increase the interest rate applicable to the outstanding bonds issued by the Administrator during such fiscal year. Such increase shall be effective commencing with the fiscal year immediately following the fiscal year during which such failure occurred and shall not exceed 1 per centum for each such fiscal year during which such repayments are not in accord with such criteria. The Secretary of the Treasury shall take into account amounts that the Administrator has repaid in advance of any repayment criteria in determining whether to increase such rate. Before such rate is increased, the Secretary of the Treasury, in consultation with the Administrator and the

Federal Energy Regulatory Commission, must be satisfied that the Administrator will have the ability to pay such increased rate, taking into account the Administrator's obligations. Such increase shall terminate with the fiscal year in which repayments (including repayments of the increased rate) are in accordance with the repayment criteria of the Secretary of Energy."

(e) Clause (2) of section 1(b) of the Act of August 31, 1964 (78 Stat. 756) is amended to read as follows: "(2) any contiguous areas, not in excess of seventy-five airline miles from said region, which are a part of the service area of a rural electric cooperative served by the Administrator on the effective date of the Pacific Northwest Electric Power Planning and Conservation Act which has a distribution system from which it serves both within and without said region."

ADMINISTRATIVE PROVISIONS

SECTION 9. (a) Subject to the provisions of this Act, the Administrator is authorized to contract in accordance with section 2(f) of the Bonneville Project Act of 1937 (16 U.S.C. 832a(f)). Other provisions of law applicable to such contracts on the effective date of this Act shall continue to be applicable.

(b) The Administrator shall discharge the executive and administrative functions of his office in accordance with the policy established by the Bonneville Project Act of 1937 (16 U.S.C. 832 and following), section 302(a) (2) and (3) of the Department of Energy Organization Act, and this Act. The Secretary of Energy, the Council, and the Administrator shall take such steps as are necessary to assure the timely implementation of this Act in a sound and businesslike manner. Nothing in this Act shall be construed by the Secretary, the Administrator, or any other official of the Department of Energy to modify, alter, or otherwise affect the requirements and directives expressed

by the Congress in section 302(a) (2) and (3) of the Department of Energy Organization Act or the operations of such officials as they existed prior to enactment of this Act.

(c) Any contract of the Administrator for the sale or exchange of electric power for use outside the Pacific Northwest shall be subject to limitations and conditions corresponding to those provided in sections 2 and 3 of the Act of August 31, 1964 (16 U.S.C. 837a and 837b) for any contract for the sale, delivery, or exchange of hydroelectric energy or peaking capacity generated within the Pacific Northwest for use outside the Pacific Northwest. In applying such sections for the purposes of this subsection, the term "surplus energy" shall mean electric energy for which there is no market in the Pacific Northwest at any rate established for the disposition of such energy, and the term "surplus peaking capacity" shall mean electric peaking capacity for which there is no demand in the Pacific Northwest at the rate established for the disposition of such capacity. The authority granted, and duties imposed upon, the Secretary by sections 5 and 7 of such Act (16 U.S.C. 837e and 837f) shall also apply to the Administrator in connection with resources acquired by the Administrator pursuant to this Act. The Administrator shall, in making any determination, under any contract executed pursuant to section 5, of the electric power requirements of any Pacific Northwest customer, which is a non-Federal entity having its own generation, exclude, in addition to hydroelectric generated energy excluded from such requirements pursuant to section 3(d) of such Act (16 U.S.C. 837b(d)), any amount of energy included in the resources of such customer for service to firm loads in the region if (1) such amount was disposed of by such customer outside the region, and (2) as a result of such disposition, the firm energy requirements of such customer or other customers of the Administrator are increased. Such amount of energy shall not be excluded, if the Administrator determines that

through reasonable measures such amount of energy could not be conserved or otherwise retained for service to regional loads. The Administrator may sell as replacement for any amount of energy so excluded only energy that would otherwise be surplus.

(d) No restrictions contained in subsection (c) shall limit or interfere with the sale, exchange or other disposition of any power by any utility or group thereof from any existing or new non-Federal resource if such sale, exchange or disposition does not increase the amount of firm power the Administrator would be obligated to provide to any customer. In addition to the directives contained in subsections (i)(1)(B) and (i)(3) and subject to:

- (1) any contractual obligations of the Administrator,
- (2) any other obligations under existing law, and
- (3) the availability of capacity in the Federal transmission system,

the Administrator shall provide transmission access, load factoring, storage and other services normally attendant thereto to such utilities and shall not discriminate against any utility or group thereof on the basis of independent development of such resource in providing such services.

(e)(1) For purposes of sections 701 through 706 of title 5, United States Code, the following actions shall be final actions subject to judicial review—

(A) adoption of the plan or amendments thereto by the Council under section 4, adoption of the program by the Council, and any determination by the Council under section 4(h);

(B) sales, exchanges, and purchases of electric power under section 5;

(C) the Administrator's acquisition of resources under section 6;

(D) implementation of conservation measures under section 6;

(E) execution of contracts for assistance to sponsors under section 6(f);

(F) granting of credits under section 6(h);

(G) final rate determinations under section 7; and

(H) any rule prescribed by the Administrator under section 7(m)(2) of this Act.

(2) The record upon review of such final actions shall be limited to the administrative record compiled in accordance with this Act. The scope of review of such actions without a hearing or after a hearing shall be governed by section 706 of title 5, United States Code, except that final determinations regarding rates under section 7 shall be supported by substantial evidence in the rulemaking record required by section 7(i) considered as a whole. The scope of review of an action under section 6(c) shall be governed by section 706 of title 5, United States Code. Nothing in this section shall be construed to require a hearing pursuant to section 554, 556, or 557 of title 5 of the United States Code.

(3) Nothing in this section shall be construed to preclude judicial review of other final actions and decisions by the Council or Administrator.

(4) For purposes of this subsection—

(A) major resources shall be deemed to be acquired upon publication in the Federal Register pursuant to section 6(c)(4)(B);

(B) resources, other than major resources, shall be deemed to be acquired upon execution of the contract therefor;

(C) conservation measures shall be deemed to be implemented upon execution of the contract or grant therefor; and

(D) rate determinations pursuant to section 7 shall be deemed final upon confirmation and approval by the Federal Energy Regulatory Commission.

(5) Suits to challenge the constitutionality of this Act, or any action thereunder, final actions and decisions taken pursuant to this Act by the Administrator or the Council, or the implementation of such final actions, whether brought pursuant to this Act, the Bonneville Project Act, the Act of August 31, 1964 (16 U.S.C. 837-837h), or the Federal Columbia River Transmission System Act (16 U.S.C. 838 and following), shall be filed in the United States court of appeals for the region. Such suits shall be filed within ninety days of the time such action or decision is deemed final, or, if notice of the action is required by this Act to be published in the Federal Register, within ninety days from such notice, or be barred. In the case of a challenge of the plan or programs or amendments thereto, such suit shall be filed within sixty days after publication of a notice of such final action in the Federal Register. Such court shall have jurisdiction to hear and determine any suit brought as provided in this section. The plan and program, as finally adopted or portions thereof, or amendments thereto, shall not thereafter be reviewable as a part of any other action under this Act or any other law. Suits challenging any other actions under this Act shall be filed in the appropriate court.

(f) For purposes of enabling the Administrator to acquire resources necessary to meet the firm load of public bodies, cooperatives, and Federal agencies from a governmental unit at a cost no greater than the cost which would be applicable in the absence of such acquisition, the exemption from gross income of interest on certain governmental obligations provided in section 103(a)(1) of the Internal Revenue Code of 1954 shall not be affected by the Administrator's acquisition of such resources if—

(1) the Administrator, prior to contracting for such acquisition, certifies to his reasonable belief, that the persons for whom the Administrator is acquiring such resources for sale pursuant to section 5 of this Act are public bodies, cooperatives, and Federal agencies,

unless the Administrator also certifies that he is unable to acquire such resources without selling a portion thereof to persons who are not exempt persons (as defined in section 103(b) of such Code), and

(2) based upon such certification, the Secretary of the Treasury determines in accordance with applicable regulations that less than a major portion of the resource is to be furnished to persons who are not exempt persons (as defined in section 103(b) of such Code).

The certification under paragraph (1) shall be made in accordance with this subsection and a procedure and methodology approved by the Secretary of the Treasury. For purposes of this subsection, the term "major portion" shall have the meaning provided by regulations issued by the Secretary of the Treasury.

(g) When reviewing rates for the sale of power to the Administrator by an investor-owned utility customer under section 5(c) or 6, the Federal Energy Regulatory Commission shall, in accordance with section 209 of the Federal Power Act (16 U.S.C. 824h)—

(1) convene a joint State board, and

(2) invest such board with such duties and authority as will assist the Commission in its review of such rates.

(h)(1) No "company" (as defined in section 2(a)(2) of the Public Utility Holding Company Act of 1935; 15 U.S.C. 79b(a)(2)), which owns or operates facilities for the generation of electricity (together with associated transmission and other facilities) primarily for sale to the Administrator under section 6 shall be deemed an "electric utility company" (as defined in section 2(a)(3) of the Public Utility Holding Company Act of 1935; 15 U.S.C. 79b(a)(3)), within the meaning of any provision or provisions of chapter 2C of title 15 of the United States Code, if at least 90 per

centum of the electricity generated by such company is sold to the Administrator under section 6, and if—

(A) the organization of such company is consistent with the policies of section 1 (b) and (c) of the Public Utility Holding Company Act of 1935, as determined by the Securities and Exchange Commission, with the concurrence of the Administrator, at the time of such organization; and

(B) participation in any facilities of such "company" has been offered to public bodies and cooperatives in the region pursuant to section 6(m).

(2) The Administrator shall include in any contract for the acquisition of a major resource from such "company" provisions limiting the amount of equity investment, if any, in such "company" to that which the Administrator determines will be consistent with achieving the lowest attainable power costs attributable to such major resource.

(3) In the case of any "company" which meets the requirements of paragraph (1), the Administrator, with the concurrence of such Commission, shall approve all significant contracts entered into by, and between, such "company" and any sponsor company or any subsidiary of such sponsor company which are determined to be consistent with the policies of section 1(b) and (c) of the Public Utility Holding Company Act of 1935 at the time such contracts are entered into. The Administrator and the Securities and Exchange Commission shall exercise such approval authority within sixty days after receipt of such contracts. Such contracts shall not be effective without such approval.

(4) Paragraph (1) of this subsection shall continue to apply to any such "company" unless the Administrator or the Securities and Exchange Commission, or both, through periodic review, (A) determine at any time that the "company" no longer operates in a manner consistent with the policies of section 1 (b) and (c) of the Public Utility Hold-

ing Company Act of 1935 and in accordance with this subsection, and (B) notify the "company" in writing of such preliminary determination. This subsection shall cease to apply to such "company" thirty days after receipt of notification of a final determination thereof. A final determination shall be made only after public notice of the preliminary determination and after a hearing completed not later than sixty days from the date of publication of such notice. Such final determination shall be made within thirty days after the date of completion of such hearing.

(i)(1) At the request and expense of any customer or group of customers of the Administrator within the Pacific Northwest, the Administrator shall, to the extent practicable—

(A) acquire any electric power required by (i) any customer or group of customers to enable them to replace resources determined to serve firm load under section 5(b), or (ii) direct service industrial customers to replace electric power that is or may be curtailed or interrupted by the Administrator (other than power the Administrator is obligated to replace), with the cost of such replacement power to be distributed among the direct service industrial customers requesting such power; and

(B) dispose of, or assist in the disposal of, any electric power that a customer or group of customers proposes to sell within or without the region at rates and upon terms specified by such customer or group of customers, if such disposition is not in conflict with the Administrator's other marketing obligations and the policies of this Act and other applicable laws.

(2) In implementing the provisions of subparagraphs (A) and (B) of paragraph (1), the Administrator may prescribe policies and conditions for the independent acquisition or disposition of electric power by any direct service industrial customer or group of such customers for

the purpose of assuring each direct service industrial customer an opportunity to participate in such acquisition or disposition.

(3) The Administrator shall furnish services including transmission, storage, and load factoring unless he determines such services cannot be furnished without substantial interference with his power marketing program, applicable operating limitations or existing contractual obligations. The Administrator shall, to the extent practicable, give priority in making such services available for the marketing, within and without the Pacific Northwest, of capability from projects under construction on the effective date of this Act, if such capability has been offered for sale at cost, including a reasonable rate of return, to the Administrator pursuant to this Act and such offer is not accepted within one year.

(j)(1) The Council, as soon as practicable after the enactment of this Act, shall prepare, in consultation with the Administrator, the customers, appropriate State regulatory bodies, and the public, a report and shall make recommendations with respect to the various retail rate designs which will encourage conservation and efficient use of electric energy and the installation of consumer-owned renewable resources on a cost-effective basis, as well as areas for research and development for possible application to retail utility rates within the region. Studies undertaken pursuant to this subsection shall not affect the responsibilities of any customer or the Administrator which may exist under the Public Utility Regulatory Policies Act of 1978.

(2) Upon request, and solely on behalf of customers so requesting, the Administrator is authorized to (A) provide assistance in analyzing and developing retail rate structures that will encourage cost-effective conservation and the installation of cost-effective consumer-owned renewable resources; (B) provide estimates of the probable power savings and the probable amount of billing credits under

section 6(h) that might be realized by such customers as a result of adopting and implementing such retail rate structures; and (C) solicit additional information and analytical assistance from appropriate State regulatory bodies and the Administrator's other customers.

(k) There is hereby established within the administration an executive position for conservation and renewable resources. Such executive shall be appointed by the Administrator and shall be assigned responsibility for conservation and direct-application renewable resource programs (including the administration of financial assistance for such programs). Such position is hereby established in the senior executive service in addition to the number of such positions heretofore established in accordance with other provisions of law applicable to such positions.

SAVINGS PROVISIONS

SECTION 10. (a) Nothing in this Act shall be construed to affect or modify any right of any state or political subdivision thereof or electric utility to—

(1) determine retail electric rates, except as provided by section 5(c)(3);

(2) develop and implement plans and programs for the conservation, development, and use of resources; or

(3) make energy facility siting decisions, including, but not limited to, determining the need for a particular facility, evaluating alternative sites, and considering alternative methods of meeting the determined need.

(b) Nothing in this Act shall alter, diminish, or abridge the rights and obligations of the Administrator or any customer under any contract existing as of the effective date of this Act.

(c) Nothing in this Act shall alter, diminish, abridge, or otherwise affect the provisions of other Federal laws by which public bodies and cooperatives are entitled to pref-

erence and priority in the sale of federally generated electric power.

(d) If any provision of this Act is found to be unconstitutional, then any contract entered into by the Administrator, prior to such finding and in accordance with such provisions, to sell power, acquire or credit resources, or to reimburse investigation and preconstruction expenses pursuant to section 5, and section 6(a), (f) or (h) of this Act shall not be affected by such finding.

(e) Nothing in this Act shall be construed to affect or modify any treaty or other right of an Indian tribe.

(f) The reservation under law of electric power primarily for use in the State of Montana by reason of the construction of Hungry Horse and Libby Dams and Reservoirs within that State is hereby affirmed. Such reservation shall also apply to 50 per centum of any electric power produced at Libby Reregulating Dam if built. Electric power so reserved shall be sold at the rate or rates set pursuant to section 7.

(g) Nothing in this Act shall be construed to affect or modify the right of any State to prohibit utilities regulated by the appropriate State regulatory body from recovering, through their retail rates, costs during any period of resource construction.

(h) Nothing in this Act shall be construed as authorizing the appropriation of water by any Federal, State or local agency, Indian tribe, or any other entity or individual. Nor shall any provision of this Act of any plan or program adopted pursuant to the Act (1) affect the rights or jurisdictions of the United States, the States, Indian tribes, or other entities over waters of any river or stream or over any groundwater resource, (2) alter, amend, repeal, interpret, modify, or be in conflict with any interstate compact made by the States, or (3) otherwise be construed to alter or establish the respective rights of States, the United

States, Indian tribes, or any person with respect to any water or water-related right.

(i) Nothing in this Act shall be construed to affect the validity of any existing license, permit, or certificate issued by any Federal agency pursuant to any other Federal law.

EFFECTIVE DATE

SECTION 11. This Act shall be effective on the date of enactment, or October 1, 1980, whichever is later. For purposes of this Act, the term "date of the enactment of this Act" means such date of enactment or October 1, 1980, whichever is later.

SEVERABILITY

SECTION 12. If any provision of section 4(a) through (c) of this Act or any other provision of this Act or the application thereof to any person, State, Indian tribe, entity, or circumstance is held invalid, neither the remainder of section 4 or any other provisions of this Act, nor the application of such provisions to other persons, States, Indian tribes, entities, or circumstances, shall be affected thereby.

Approved December 5, 1980.

LEGISLATIVE HISTORY:

HOUSE REPORTS: No. 96-976, Pt. I (Comm. on Interstate and Foreign Commerce), and No. 96-976, Pt. II (Comm. on Interior and Insular Affairs).

SENATE REPORT No. 96-272 (Comm. on Energy and Natural Resources).

CONGRESSIONAL RECORD:

Vol. 125 (1979): Aug. 3, considered and passed Senate.

Vol. 126 (1980): Sept. 24, 29, Nov. 12-14, 17, considered and passed House, amended, in lieu of H.R. 8157.

Nov. 19, Senate concurred in House amendment.

Appendix C

CONGRESSIONAL RECORD—SENATE

August 3, 1979 (daily ed.)

Page S 11592

Mr. HATFIELD. Mr. President, I commend the chairman (Mr. Jackson) and my Northwest colleagues on the committee, the Senators from Idaho (Mr. Church and Mr. McClure) and Montana (Mr. Melcher), for lending their tremendous efforts to the fashioning of this most remarkable piece of legislation.

Without any doubt, I predict it will be viewed in the future as the most important bill ever to have affected the Pacific Northwest. Certainly not since the Federal decision to build Bonneville Dam have we considered anything with such profound long-range impact on the region as we are considering today.

We owe special recognition today to the willingness of the many interest groups of the Northwest to bury old differences and historic animosities and work cooperatively toward a regional solution to our electric power problems. Public power, private power, the direct service industries, the four Governors, the cities of Seattle and Portland, and several environmental and consumer organizations provided the needed thread to weave this complex fabric. We also owe thanks to the personnel at Bonneville Power Administration who provided the necessary backup for the negotiations that have taken place, and who worked tirelessly on endless details when less capable and less dedicated people would have given out. I am particularly appreciative of the work of Mr. Earl Gjælde and Mr. Larry Hittle of Administrator Sterling Munro's staff.

Appendix D

96TH CONGRESS HOUSE OF REPRESENTATIVES REPT. 96-976
2d Session Part I

**PACIFIC NORTHWEST ELECTRIC POWER
AND PLANNING CONSERVATION ACT**

MAY 15, 1980. — Ordered to be printed

Mr. STAGGERS, from the Committee on Interstate and
Foreign Commerce, submitted the following

R E P O R T

together with

MINORITY AND ADDITIONAL VIEWS

[To accompany S. 885 which on September 5, 1979, was
jointly referred to the Committee on Interstate and
Foreign Commerce and the Committee on Interior and
Insular Affairs.]

[Including Cost Estimate of the Congressional
Budget Office]

The Committee on Interstate and Foreign Commerce, to
whom was referred the bill (S. 885) to assist the electrical
consumers of the Pacific Northwest through use of the
Federal Columbia River Power System to achieve cost-
effective energy conservation, to encourage the development
of renewable energy resources, to establish a representa-
tive regional power planning process, to assure the region
of an efficient and adequate power supply, and for other
purposes, having considered the same, report favorably
thereon with an amendment and recommends that the bill
as amended do pass.

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THE AMENDMENT

The amendment is as follows:

Strike out all after the enacting clause and insert in lieu thereof the following:

SHORT TITLE AND TABLE OF CONTENTS

SECTION 1. This Act, together with the following table of contents, may be cited as the "Pacific Northwest Electric Power Planning and Conservation Act."

TABLE OF CONTENTS

- Section 1. Short title and table of contents.
- Section 2. Purposes.
- Section 3. Definitions.
- Section 4. Regional planning and participation.
- Section 5. Sale of power.
- Section 6. Conservation and resource acquisition.
- Section 7. Rates.
- Section 8. Amendments to existing law.
- Section 9. Administrative provisions.
- Section 10. Savings provisions.

PURPOSES

SECTION 2. The purposes of this Act are —

(1) to encourage, through the unique opportunity provided by the Federal Columbia River Power System, conservation and efficiency in the use of electric power and the development of renewable resources within the Pacific Northwest and to assure the Pacific Northwest an adequate, efficient and reliable power supply consistent with applicable environmental and other provisions of law;

(2) to provide for the participation and consultation of the Pacific Northwest States, local governments,

consumers, customers, users of the Columbia River System (including Federal and State fish and wildlife agencies and appropriate Indian tribes), and the public at large within the region in the development of regional plans and programs related to energy conservation, renewable resources, other resources, and the protection, mitigation, and enhancement of fish and wildlife resources and in the orderly planning of the Federal Columbia River Power System;

(3) to provide that the customers of the Bonneville Power Administration and their consumers continue to pay all costs necessary to produce, transmit, and conserve resources to meet the region's electric power requirements, including the amortization of the Federal investment in the Federal Columbia River Power System;

(4) to insure, subject to the provisions of this Act —

(A) that the authorities and responsibilities of State and local governments, electric utility systems, and other non-Federal entities for the regulation, planning, conservation, supply, distribution, and use of electric power shall be construed to be maintained, and

(B) that Congress intends that this Act not be construed to limit or restrict the ability of customers to take actions in accordance with other applicable provisions of Federal or State law, including, but not limited to, actions to plan, develop, and operate resources to achieve conservation, without regard to this Act; and

(5) to protect, mitigate, and enhance the fish and wildlife, including related spawning grounds and habitat, of the Columbia River and its tributaries, particularly anadromous fish which are of significant importance to the social and economic well being of the Pacific Northwest and the Nation and which are de-

pendent on suitable environmental conditions substantially obtainable from the management and operation of the Federal Columbia River Power System and other facilities on the Columbia River and its tributaries.

DEFINITIONS

SECTION 3. As used in this Act, the term —

(1) "Acquire" and "acquisition" shall not be construed as authorizing the Administrator to construct, or have ownership of, under this Act or any other law, any electric generating facility.

(2) "Administrator" means the Administrator of the Bonneville Power Administration.

(3) "Conservation" means any reduction in electric power consumption as a result of increases in the efficiency of energy use, production, or distribution.

(4)(A) "Cost-effective", when applied to any measure or resource referred to in this Act, means that such measure or resource must be forecast —

(i) to be reliable and available within the time it is needed, and

(ii) to meet or reduce the electric power demand, as determined by the Council or the Administrator, as appropriate, of the consumers of the customers at an estimated incremental system cost no greater than that of the least-cost similarly reliable and available alternative measure or resource, or any combination thereof.

(B) For purposes of this paragraph, the term "system cost" means an estimate of all direct costs of a measure or resource over its effective life, including, if applicable, the cost of distribution and transmission to the consumer and, among other factors, waste disposal costs, end-of-cycle costs, and fuel costs, and such quanti-

fiable environmental costs and benefits as the Administrator determines, on the basis of a methodology developed by the Council as part of the plan, or in the absence of the plan by the Administrator, are directly attributable to such measure or resource.

(C) In determining the amount of power that a conservation measure or other resource may be expected to save or to produce, the Council or the Administrator, as the case may be, shall take into account projected realization factors and plant factors, including appropriate historical experience with similar measures or resources.

(D) For purposes of this paragraph, the "estimated incremental system cost" of any conservation measure or resource shall not be treated as greater than that of any nonconservation measure or resource unless the incremental system cost of such conservation measure or resource is in excess of 110 per centum of the incremental system cost of the nonconservation measure or resource.

(5) "Consumer" means any end user of electric power.

(6) "Council" means, unless otherwise specifically provided, the voting members appointed to the Pacific Northwest Electric Power and Conservation Planning Council established by this Act.

(7) "Customer" means anyone who contracts for the purchase of power from the Administrator pursuant to this Act.

(8) "Direct service industrial customer" means an industrial customer that contracts for the purchase of power from the Administrator for direct consumption.

(9) "Electric power" means electric peaking capacity, or electric energy, or both.

(10) "Federal base system resources" means —

(A) the Federal Columbia River Power System hydroelectric projects;

(B) resources acquired by the Administrator under long-term contracts in force on the effective date of this Act; and

(C) resources acquired by the Administrator in an amount necessary to replace reductions in capability of the resources referred to in subparagraphs (A) and (B).

(11) "Indian tribe" means any Indian tribe, band, nation, or other organized group or community which is located in whole or in part in the region and which is recognized as eligible for the special programs and services provided by the United States to Indians because of their special status.

(12) "Members of the council" means only the voting members of the council.

(13) "Major resource" means any resource having a planned capability greater than fifty average megawatts, other than electric power acquired by purchase by the Administrator for a period of five years or less pursuant to section 11(b)(6) of the Federal Columbia River Transmission System Act.

(14) "New large single load" means any load associated with a new facility, an existing facility, or an expansion of an existing facility —

(A) which is not contracted for, or committed to, as determined by the Administrator, by a public body, cooperative, or Federal agency customer prior to October 1, 1978, in the case of industrial loads, or September 1, 1979, in the case of other than industrial loads, and

(B) which will result in an increase in power requirements of ten average megawatts or more in any consecutive twelve-month period.

(15) "Pacific Northwest", "region", or "regional" means —

(A) the area consisting of the States of Oregon, Washington, and Idaho, the portion of the State of Montana west of the Continental Divide, and such portions of the States of Nevada, Utah, and Wyoming as are within the Columbia River drainage basin; and

(B) any contiguous areas, not in excess of seventy-five air miles from the area referred to in subparagraph (A), which are a part of the service area of a rural electric cooperative customer served by the Administrator on the effective date of this Act which has a distribution system from which it serves both within and without such region.

(16) "Plan" means the Regional Electric Power and Conservation plan adopted pursuant to this Act and such plan shall apply to actions of the Administrator as specified in this Act.

(17) "Renewable resource" means a resource which utilizes solar, wind, hydro, geothermal, biomass, or similar sources of energy and which either is used for electric power generation or will reduce the electric power requirements of a consumer, including by direct application.

(18) "Reserves" means the electric power needed to avert particular planning or operating shortages for the benefit of firm power customers of the Administrator and available to the Administrator (A) from resources or (B) from rights to interrupt, curtail, or otherwise withdraw, as provided by specific contract

provisions, portions of the electric power supplied to customers.

(19) "Residential use" or "residential load" means all usual residential, apartment, seasonal dwelling and farm electrical loads or uses, but only the first two hundred horsepower during any monthly billing period of farm irrigation and pumping for any farm.

(20) "Resource" means —

(A) electric power, including the actual or planned electric power capability of generating facilities, or

(B) actual or planned load reduction resulting from direct application of a renewable energy resource by a consumer, or from a conservation measure.

(21) "Secretary" means the Secretary of Energy.

REGIONAL PLANNING AND PARTICIPATION

Section 4. (a) (1) There is established the "Pacific Northwest Electric Power and Conservation Planning Council" which shall have its offices in the Pacific Northwest. The Council shall be composed of eleven voting members selected as follows:

(A) four from the State of Washington,

(B) three from the State of Oregon,

(C) two from the State of Idaho, and

(D) two from the State of Montana.

(2) As soon as practicable, but not more than forty-five days after the effective date of this Act and thereafter within forty-five days after a vacancy occurs, the Governor of the States of Washington, Oregon, Idaho, and Montana may each (under applicable State laws, if any) provide to the Secretary a list of nominations from such State for each

of the State's positions to be selected for the Council. The list shall include at least two persons for each such position. The list shall include such information about such nominees as the Secretary may request. The Secretary shall appoint the Council members from each Governor's list of nominations for each State's positions. The Secretary may decline to appoint for any reason any of a Governor's nominees for a position and shall notify the Governor, whereupon the Governor may make successive nominations within forty-five days of receipt of such notice until nominees, acceptable to the Secretary, are appointed for each position. In the event the Governor of any such State fails to make the required nominations for any State position on the Council within the time specified for such nominations (which time may be extended by the Secretary in his discretion), the Secretary shall select and appoint the Council member or members from such State for such position.

(3) The members of the Council shall serve for a term of three years, except that, with respect to members initially appointed, the Secretary shall designate four members thereof to serve a term of two years, four members thereof to serve a term of three years, and the remaining three such members to serve for a term of four years. Successive members of the Council shall be nominated and appointed in the same manner as the original members. Any person appointed to fill a Council vacancy occurring prior to the expiration of the term of such office shall be appointed for the remainder of that term.

(4) The Administrator shall be an ex officio, nonvoting member of the Council. The Secretary shall also appoint as ex officio nonvoting members such other Federal officials as he determines appropriate to the Council who have responsibilities for the Federal Columbia River Power System hydroelectric projects and for the fish and wildlife affected by such System. The Secretary may also appoint persons from the general public as nonvoting members of the Council.

(5) The voting members of the Council who are not employed by the United States or a State shall receive compensation at a rate equal to the rate prescribed for offices and positions at level GS-18 of the General Schedule for each day such members are engaged in the actual performance of duties as members of the Council, except that no such member may be paid more in any calendar year than an officer or employee at step 1 of level GS-18 is paid during such year. Members of the Council shall be considered officers or employees of the United States for purposes of title II of the Ethics in Government Act of 1978 (5 U.S.C. app.). The voting members of the Council shall also be allowed travel expenses, including per diem in lieu of subsistence, in the same manner as persons employed intermittently in Government service are allowed expenses under section 5703 of title 5 of the United States Code.

(6) A majority of the members of the Council shall constitute a quorum. Except as otherwise provided specifically in this Act, all actions and decisions of the Council shall be by majority vote of the voting members present and voting. The plan or any part thereof and any amendment thereto shall not be approved unless such plan or amendment receives the votes of a majority of the voting members appointed to the Council, including the vote of at least one member from each State.

(7) The members of the Council shall select a Chairman for the Council. The Council shall meet at the call of the Chairman or upon the request of a majority of the members of the Council. If any member of the Council disagrees with respect to any matter transmitted to any Federal or State official or any other person or wishes to express additional views concerning such matter, such member may submit a statement to accompany such matter setting forth the reasons for such disagreement or views.

(8) The Council shall appoint, and assign duties to, an executive director who shall serve at the pleasure of the Council and who shall be compensated at the rate estab-

lished for GS-18 of the General Schedule. The executive director shall exercise the powers and duties delegated to such director by the Council, including the power to appoint and fix compensation of additional personnel in accordance with applicable Federal law to carry out the functions of the Council.

(9) Upon request of the Council, the head of any Federal agency is authorized to detail to the Council, on a reimbursable basis, any of the personnel of such agency to assist the Council in the performance of its functions under this Act.

(10) To obtain such information and advice as the Council determines to be necessary or appropriate to carry out the purposes of this Act, the Council shall, to the greatest extent practicable, solicit engineering, economic, social, environmental, and other technical studies from customers of the Administrator with particular expertise and from other bodies or organizations in the region. The Council is authorized to enter into contracts in accordance with provisions of law applicable to the Department of Energy.

(11) At the Council's request, the Administrator of the General Services shall furnish the Council with such offices, equipment, supplies, and services in the same manner and to the same extent as such Administrator is authorized to furnish to any other agency or instrumentality of the United States such offices, supplies, equipment, and services.

(12) The Council shall determine its organization and prescribe its practices and procedures for carrying out its functions under this Act. The Council shall publish in the Federal Register and make available to the public a statement of its organization, practices, and procedures, and make available to the public its annual work program budget at the time the President submits his annual budget to Congress.

(13) The Administrator and other Federal agencies, to the extent authorized by other provisions of law, shall furnish the Council all information requested by the Coun-

cil as necessary for the performance of its functions, subject to such requirements of law concerning trade secrets and proprietary data as may be applicable.

(14)(A) At the request of the Council, the Administrator shall pay from funds available to the Administrator the compensation and other expenses of the Council as are authorized by this Act and as the Council determines are necessary or appropriate for the performance of its functions. Funds for such payments shall be included by the Administrator in his annual budgets submitted to Congress pursuant to the Federal Columbia River Transmission System Act and shall be subject to the requirements of that Act, including the audit requirements of section 11(d). Such funds shall not exceed annually an amount equal to 0.02 mill multiplied by the kilowatt hours sold by the Administrator during the preceding calendar year. In order to assist the Council's initial organization, the Administrator after the enactment of this Act shall promptly prepare and propose an amended annual budget to expedite payment for Council activities.

(B) Notwithstanding the limitation contained in the third sentence of subparagraph (A), upon an annual showing by the Council that such limitation will not permit the Council to carry out its functions under this Act, the Administrator may raise such limit up to any amount not in excess of 0.10 mills.

(b) The Council shall, subject to applicable law, establish a voluntary scientific and statistical advisory committee to assist in the development, collection, and evaluation of such statistical, biological, economic, social, environmental, and other scientific information as is relevant to the Council's development and amendment of a regional conservation and electric power plan.

(c) The Council may, subject to applicable law, establish such other voluntary advisory committees as it determines are necessary or appropriate to assist it in carrying out its functions under this Act.

(d) Within two years after the effective date of this Act, the Council shall prepare, adopt, and promptly transmit to the Administrator a regional conservation and electric power plan. The adopted plan, or any portion thereof, may be amended from time to time, and shall be reviewed by the Council not less frequently than once every five years. Prior to such adoption, public hearings shall be held in each Council member's State on the plan or substantial, nontechnical amendments to the plan proposed by the Council for adoption. A public hearing shall also be held in any other State of the region on the plan or amendments thereto, if the Council determines that the plan or amendments would likely have a substantial impact on that State in terms of major resources which may be developed in that State and which the Administrator may seek to acquire. Action of the Council under this subsection concerning such hearings shall be subject to section 553 of title 5, United States Code and such procedures as the Council shall adopt.

(e)(1) The plan shall, as provided in this paragraph, give priority to resources which the Council determines to be cost-effective. Priority shall be given: first, to conservation; second, to renewable resources; third, to generating resources utilizing waste heat or generating resources of high fuel conversion efficiency; and fourth, to all other resources.

(2) The plan shall set forth a general scheme for implementing conservation measures and developing resources pursuant to section 6 of this Act to reduce or meet the Administrator's obligations with due consideration by the Council for (A) environmental quality, (B) compatibility with the existing regional power system, (C) protection, mitigation, and enhancement of fish and wildlife and related spawning grounds and habitat including sufficient quantities and qualities of flows for successful migration, survival, and propagation of anadromous fish, and (D) other criteria which may be set forth in the plan.

(3) To accomplish the priorities established by this subsection, the plan shall include, but not be limited to, the following elements:

(A) an energy conservation program to be implemented under this Act including, but not limited to, model conservation standards;

(B) recommendations for research and development;

(C) a methodology for determining quantifiable environmental costs and benefits under section 3(4);

(D) a demand forecast of at least twenty years (developed in consultation with the Administrator, the customers, the States, including State agencies with ratemaking authority over electric utilities, and the public, in such manner as the Council deems appropriate) of power resources estimated by the Council to be required to meet the Administrator's obligations and the portion of such obligations the Council determines can be met by resources in each of the priority categories referred to in paragraph (1) which forecast (i) shall include regional reliability and reserve requirements and (ii) may include the approximate amounts of power the Council recommends should be acquired by the Administrator on a long term basis and the types of resources from which such power should be acquired;

(E) an analysis of reserve and reliability requirements and cost-effective methods of providing reserves designed to ensure adequate electric power at the lowest probable cost; and

(F) if the Council recommends surcharges pursuant to subsection (f), a methodology for calculating such surcharges.

(f)(1) Model conservation standards to be included in the plan shall include, but not limited to, standards applicable to (A) new and existing structures, (B) utility, cus-

tomers, and governmental conservation programs, and (C) other consumer actions for achieving conservation. Model conservation standards shall reflect geographic and climatic differences within the region and other appropriate considerations, and shall be designed to produce all power savings that are economically feasible for consumers, taking into account financial assistance made available to consumers under section 6(a) of this Act. These model conservation standards shall be adopted by the Council and included in the plan after consultation, in such manner as the Council deems appropriate, with the Administrator, States, and political subdivisions, customers of the Administrator, and the public.

(2) The Council by a majority vote of the members of the Council is authorized to recommend to the Administrator a surcharge and the Administrator may thereafter impose such a surcharge, in accordance with the methodology provided in the plan, on customers for those portions of their loads within the region that are within States or political subdivisions which have not, or on the Administrator's customers which have not, implemented conservation measures applicable to such customers that achieve energy savings which the Administrator determines are comparable to those which would be obtained under such standards. Such surcharges shall be established to recover such additional costs as the Administrator determines will be incurred because such projected energy savings attributable to such conservation measures have not been achieved, but in no case may such surcharges be less than 10 per centum or more than 50 per centum of the Administrator's applicable rates for such load or portion thereof.

(g) To ensure widespread public involvement in the formulation of regional power policies, the Council and the Administrator shall maintain comprehensive programs to inform the Pacific Northwest public of major regional power issues, to obtain public views concerning those issues, and

to secure advice and consultation from the Administrator's customers and others.

(h)(1) The Council shall request in writing promptly after the effective date of this Act and prior to the development of a plan or any amendment thereto from the Federal and the region's State fish and wildlife agencies and appropriate Indian tribes recommendations for —

(A) measures to protect, mitigate, and enhance fish and wildlife, including related spawning grounds and habitat, affected by the development and operation of any hydroelectric project of the Columbia River and its tributaries, including recommendations for achieving sufficient quantities and quality of flows for successful migration, survival, and propagation and anadromous fish, and

(B) fish and wildlife research and development which, among other things, will provide improved passage and survival for anadromous fish at and between the Region's hydroelectric dams.

Such agencies and tribes shall respond within ninety days of such request from the Council. The Council may extend the time for making such recommendations. All recommendations made pursuant to this subsection shall include detailed data in support of such recommendations. The Council shall give notice of all such recommendations and make available such recommendations and data to the Administrator and the public. Copies shall be provided subject to payment of reasonable costs of reproduction. Water management agencies, electric power producing agencies, customers, and the public may also submit written views and comments on such recommendations and also make written recommendations within such time as the Council shall provide. The Council may hold public hearings on the recommendations of such agencies and tribes, together with any other written recommendations provided to the Council. If thereafter the Council determines that such recommendations of such fish and wildlife agencies

and tribes are not inconsistent with the purposes of this Act, the Council shall adopt such recommendations. The Council may also adopt such other recommendations as the Council determines are consistent with such purposes. Nothing in this paragraph shall prevent the Council from modifying such recommendations in consultation with such fish and wildlife agencies and tribes and others. Any such determination, and the reason therefor, shall be set forth in writing and published and shall be subject to the provisions of section 9(d).

(2) The Administrator shall —

(A) utilize the Bonneville Power Administration fund, and

(B) the authorities available to the Administrator under this Act and other laws administered by the Administrator

to protect, mitigate, and enhance the fish and wildlife affected by the development and operation of any hydroelectric project of the Columbia River and its tributaries in a manner consistent with the plan and the purposes of this Act, including the recommendations adopted pursuant to paragraph (1). The Administrator may make expenditures from such fund for such purposes which shall have been included in the annual or supplementary budgets submitted to the Congress pursuant to the Federal Columbia River Transmission System Act.

(3) The Administrator and other Federal agencies responsible for the management or operation or regulation of the Federal Columbia River Power System hydroelectric projects or the hydroelectric facilities of any customer or any other electric utility located on the Columbia River or its tributaries shall exercise such responsibilities, consistent with the purposes of this Act, to adequately protect, mitigate, and enhance fish and wildlife, including related spawning grounds and habitat, affected by such projects or facilities in a manner that provides equitable treatment, for such fish and wildlife with the other purposes for which such

system and facilities are managed and operated or regulated under other provisions of law.

(4) The Administrator and such Federal agencies shall consult with the Secretary of the Interior, the Administrator of the National Marine Fisheries Service, and the State fish and wildlife agencies of the region and appropriate Indian tribes in carrying out the provisions of this subsection.

(5) Beginning on October 1 of the first fiscal year after all members to the Council are appointed initially, the Council shall submit annually a detailed report to the Committee on Energy and Natural Resources of the Senate and to the Committees on Interstate and Foreign Commerce and on Interior and Insular Affairs of the House of Representatives on the actions taken and to be taken by the Council under this section, including this subsection. At least ninety days prior to its submission of such report, the Council shall make available to such fish and wildlife agencies, and tribes, the Administrator and the customers a draft of such report. The Council shall establish procedures for timely comments thereon. The Council shall include as an appendix to such report such comments or a summary thereof. The Administrator shall keep such committees fully and currently informed of the actions taken and to be taken by the Administrator under this Act, including this subsection.

(i)(1) Following adoption of the plan and any amendment thereto, all actions of the Administrator pursuant to section 6 shall be consistent with the plan and any amendment thereto, except as otherwise specifically provided.

(2)(A) Except in the case of major resources subject to the procedures of section 6(c), the Council shall give notice to the Administrator of the types of actions under section 6 to be reviewed for consistency with the plan and may, from time to time, amend such notice.

(B) Whenever a proposed action by the Administrator under section 6 is of a type designated for review by the Council, the Administrator shall make the initial determi-

nation whether such action is consistent with the plan and, if the Administrator determines the action is consistent, so advise the Council at least sixty days prior to taking the proposed action.

(C) Within sixty days after notice of the Administrator's determination, the Council may direct the Administrator to hold a hearing in accordance with the applicable procedures of paragraphs (2), (3), and (5) of section 7(i). Upon completion of such hearing, the Administrator shall make a final determination whether or not such action is consistent with the plan.

(D) If the Council fails within the time provided to direct the Administrator to hold a hearing pursuant to subparagraph (C), the Council shall be deemed to have found the proposed action consistent with the plan.

(j)(1) The Council may request the Administrator to take an action under section 6 to carry out the Administrator's responsibilities under the plan.

(2) Within ninety days after the Council's request, the Administrator shall respond to the Council in writing specifying —

(A) the means by which the Administrator will undertake the action or any modification thereof requested by the Council, or

(B) the reasons why such action would not be consistent with the plan, or with the Administrator's legal obligations under this Act, or other provisions of law, which the Administrator shall specifically identify.

(3) If the Administrator determines not to undertake the requested action, the Council, within sixty days after notice of the Administrator's determination, may direct the Administrator to hold a hearing in accordance with the applicable procedures of paragraphs (2), (3), and (5) of section 7(i).

(4) The Administrator's final determination upon completion of such hearing shall be based on substantial evidence.

(k) In carrying out the provisions of this section, the Council and the Administrator shall —

(1) consult with the Administrator's customers;

(2) include the comments of such customers in the record of the Council's proceedings; and

(3) recognize and not abridge the authorities of State and local governments, electric utility systems, and other non-Federal entities responsible to the people of the Pacific Northwest for the planning, conservation, supply, distribution, and use of electric power and the operation of electric generating facilities.

(l) In the preparation, adoption, and implementation of the plan, the Council and the Administrator shall encourage the cooperation, participation, and assistance of appropriate State entities, State political subdivisions, and Indian tribes. The Council and the Administrator are authorized to contract, in accordance with applicable law, with such entities, tribes and subdivisions individually, in groups, or through associations thereof to (1) investigate possible measures to be included in the plan, (2) provide public involvement and information regarding a proposed plan or amendment thereto, and (3) provide services which will assist in the implementation of the plan. In order to assist in the implementation of the plan, particularly conservation, renewable resource, and fish and wildlife activities, the Administrator, when requested and subject to available funds, may provide technical assistance in establishing conservation, renewable resource, and fish and wildlife objectives by individual States or subdivisions thereof or Indian tribes. Such objectives, if adopted by a State or subdivision thereof or Indian tribes, may be submitted to the Council and the Administrator for review, and upon approval by the Council may be incorporated as part of the plan.

(ii)(1) Not later than October 1, 1986, the Council shall complete a thorough analysis of conservation measures implemented and renewable resources acquired pursuant to this Act during the five-year period beginning on the date of the enactment of this Act to determine if such measures or resources:

(A) have resulted or are likely to result in costs to consumers in the region greater than the costs of additional generating resources or additional fuel which the Council determines would be necessary in the absence of such measures or resources;

(B) have not been or are likely not to be generally equitable to all consumers in the region; or

(C) have impaired or are likely to impair the ability of the Administrator to carry out his obligations under this Act and other laws, consistent with sound business practices.

(2) The Administrator may determine that section 3(4) (D) shall cease to be effective for any conservation measure or renewable resource if the Administrator finds after receipt of such analysis from the Council that such measure or resource has any result or effect described in paragraph (A), (B) or (C).

SALE OF POWER

Section 5. (a) All power sales under this Act shall be subject at all times to the preference and priority provisions of the Bonneville Project Act of 1937 (16 U.S.C. 832 and following) and, in particular, sections 4 and 5 thereof. Such sales shall be at rates established pursuant to section 7.

(b)(1) Whenever requested, the Administrator shall offer to sell to each requesting public body and cooperative entitled to preference and priority under the Bonneville Project Act of 1937 and to each requesting investor-owned utility electric power to meet the firm power load of such

public body, cooperative or investor-owned utility in the Region to the extent that such firm power load exceeds —

(A) the capability of such entity's firm resources used in the year prior to the enactment of this Act to serve its firm load in the region, and

(B) such other resources as such entity determines, pursuant to contracts under this Act, will be used to serve its firm load in the region.

In determining the resources which are used to serve a firm load, for purposes of subparagraphs (A) and (B), any resources used to serve a firm load under such subparagraphs shall be treated as continuing to be so used, unless such use is discontinued with the consent of the Administrator, or unless such use is discontinued because of obsolescence, retirement, loss of resource, or loss of contract rights.

(2) Contracts with investor-owned utilities shall provide that the Administrator may reduce his obligations under such contracts in accordance with section 5(a) of the Bonneville Project Act of 1937.

(3) In addition to his authorities to sell electric power under paragraph (1), the Administrator is also authorized to sell electric power to Federal agencies in the region.

(4) Sales under this subsection shall be made only if the public body, cooperative, Federal agency or investor-owned utility complies with the Administrator's standards for service in effect on the effective date of this Act or as subsequently revised.

(5) The Administrator shall include in contracts executed in accordance with this subsection provisions that enable the Administrator to restrict his contractual obligations to meet the loads referred to in this subsection in the future if the Administrator determines, after a reasonable period of experience under this Act, that the Administrator cannot be assured on a planning basis of acquiring sufficient resources to meet such loads during a specified period of in-

sufficiency. Any such contract with a public body, cooperative, or Federal agency shall specify a reasonable minimum period between a notice of restriction and the earliest date such restriction may be imposed.

(6) Contracts executed in accordance with this subsection with public body, cooperative, and Federal agency customers shall —

(A) provide that the restriction referred to in paragraph (5) shall not be applicable to any such customers until the operating year in which the total of such customers' firm loads to be served by the Administrator equals or exceeds the firm capability of the Federal base system resources;

(B) not permit restrictions which would reduce the total contractual entitlement of such customers to an amount less than the firm capability of the Federal base system resources; and

(C) contain a formula for determining annually, on a uniform basis, each such customer's contractual entitlement to firm power during such a period of restriction, which formula shall not consider customer resources other than those the customer has determined, as of the effective date of this Act, to be used to serve its own firm loads.

The formula referred to in subparagraph (C) shall obligate the Administrator to provide on an annual basis only firm power needed to serve the portion of such customer's firm load in excess of the capability of such customer's own firm resources determined by such customer under paragraph (1) to be used to serve its firm load.

(c)(1) Whenever a Pacific Northwest electric utility offers to sell electric power to the Administrator at the average system cost of that utility's resources in each year, the Administrator shall acquire by purchase such power and shall offer, in exchange, to sell an equivalent amount

of electric power to such utility for resale to that utility's residential users within the region.

(2) The purchase and exchange sale referred to in paragraph (1) with any electric utility shall be limited to an amount not in excess of 50 per centum of such utility's Regional residential load in the year beginning July 1, 1980, such 50 per centum limit increasing in equal annual increments to 100 per centum of such load in the year beginning July 1, 1985, and each year thereafter.

(3) The cost benefits, as specified in contracts with the Administrator, of any purchase and exchange sale referred to in paragraph (1) which are attributable to any electric utility's residential load within a State shall be passed through directly to such utility's residential loads within such State, except that a State which lies partially within and partially without the region may require that such cost benefits be distributed among all of the utility's residential loads in that State.

(4) An electric utility may terminate, upon reasonable terms and conditions agreed to by the Administrator and such utility prior to such termination, its purchase and sale under this subsection if the supplemental rate charge provided for in section 7(b)(3) is applied and the cost of electric power sold to such utility under this subsection exceeds, after application of such rate charge, the average system cost of power sold by such utility to the Administrator under this subsection.

(5) Subject to the provisions of sections 4 and 6, in lieu of purchasing any amount of electric power offered by a utility under paragraph (1), the Administrator may acquire an equivalent amount of electric power from other sources to replace power sold to such utility as part of an exchange sale if the cost of such acquisition is less than the cost of purchasing the electric power offered by such utility.

(6) Exchange sales to a utility pursuant to this subsection shall not be restricted below the amounts of electric

power acquired by the Administrator from, or on behalf of, such utility pursuant to this subsection.

(7) The "average system cost" for electric power sold to the Administrator under this subsection shall be determined by the Administrator on the basis of a methodology developed for this purpose in consultation with the Council, the Administrator's customers, and appropriate State regulatory bodies in the region. Such methodology shall be subject to review and approval by the Federal Energy Regulatory Commission. Such average system cost shall not include —

(A) the cost of additional resources in an amount sufficient to serve any new large single load of the utility that was not contracted for, or committed to, as determined by the Administrator, prior to October 1, 1978, in the case of industrial loads, or September 1, 1979, in the case of other than industrial loads;

(B) the cost of additional resources in an amount sufficient to meet any additional load outside the region occurring after the effective date of this Act; and

(C) any costs of any generating facility which is terminated prior to initial commercial operation.

For purposes of this paragraph, the term "new large single load" means any load which will result in an increase in power requirements of ten average megawatts or more in any consecutive twelve-month period.

(d)(1)(A) The Administrator is authorized to sell in accordance with this subsection electric power to existing direct service industrial customers. Such sales shall provide a portion of the Administrator's reserves for firm power loads within the region.

(B) After the effective date of this Act, the Administrator shall offer in accordance with subsection (g) to each existing direct service industrial customer an initial long term contract that provides such customer an amount of

power equivalent to that to which such customer is entitled under its contract dated January or April 1975 providing for the sale of "industrial firm power."

(2) The Administrator shall not sell electric power, including reserves, directly to new direct service industrial customers.

(3) The Administrator shall not sell amounts of electric power, including reserves, to existing direct service industrial customers in excess of the amount permitted under paragraph (1) unless the Administrator determines that such proposed sale is consistent with the plan and that —

(A) additional power system reserves are required for the region's firm loads,

(B) the proposed sale would provide a cost-effective method of supplying such reserves,

(C) such loads or loads of similar character cannot provide equivalent operating or planning benefits to the Region if served by an electric utility under contractual arrangements providing reserves, and

(D) the Administrator has or can acquire sufficient electric power to serve such loads, and

unless the Council has approved such sale by majority vote of the members of the Council. After such determination and approval, the Administrator is authorized to offer to existing direct service industrial customers power in such amounts in excess of the amount permitted under paragraph (1) as the Administrator determines to be necessary to provide additional power system reserves to meet the region's firm loads.

(4)(A) As used in this section, the term "existing direct service industrial customer" means any direct service industrial customer of the Administrator which has a contract for the purchase of electric power from the Administrator on the effective date of this Act.

(B) The term "new direct service industrial customer" means any industrial entity other than an existing direct service industrial customer.

(e)(1) The contractual entitlement to firm power of any customer from whom, or on whose behalf, the Administrator has acquired electric power pursuant to section 6 may not be restricted below the amount of electric power so acquired from, or on behalf of, such customer. If in any year such customer's requirements are less than such entitlement, any excess of such entitlement shall be first made available to increase the entitlement of other customers of the same class before being available for the entitlement of other customers. For purposes of this paragraph, the following entities shall each constitute a class:

- (A) public bodies and cooperatives;
- (B) Federal agencies shall;
- (C) direct service industrial; and
- (D) investor owned utilities.

(2) Any contractual entitlement to firm power which is based on electric power acquired from, or on behalf of, a customer pursuant to section 6 shall be in addition to any other contractual entitlement to firm power not subject to restriction that such customer may have under this section. For the purposes of this subsection, references to amounts of power acquired by the Administrator pursuant to section 6 shall be deemed to mean the amounts specified in the resource acquisition contracts exclusive of any amounts recognized in such contracts as replacement for Federal base system resources.

(3) The Administrator shall, consistent with the provisions of this Act, insure that any restrictions upon any particular customer class made pursuant to this subsection and subsection (b) are distributed equitably throughout the region.

(f) The Administrator is authorized to sell, or otherwise dispose of, electric power, including power acquired pursuant to this and other Acts, that is surplus to his obligations incurred pursuant to subsections (b), (c), and (d) of this section in accordance with this and other Acts applicable to the Administrator, including the Bonneville Project Act of 1937 (16 U.S.C. 832 and following), the Federal Columbia River Transmission System Act (16 U.S.C. 838 and following), and the Act of August 31, 1964 (16 U.S.C. 837-837h).

(g)(1) As soon as practicable within nine months after the effective date of this Act, the Administrator shall commence necessary negotiations for, and offer, initial long-term contracts (within the limitations of the third sentence of section 5(a) of the Bonneville Project Act) simultaneously to —

(A) existing public body and cooperative customers and investor-owned utility customers under subsection (b);

(B) Federal agency customers under subsection (b);

(C) electric utility customers under subsection (c);
and

(D) direct service industrial customers under subsection (d)(1)(A).

(2) Each customer offered a contract pursuant to this subsection shall have one year from the date of such offer to accept such contract. Such contract shall be effective as provided in this subsection.

(3) An initial contract with a public body, cooperative or investor-owned electric utility customer or a Federal agency customer pursuant to subsection (b) shall be effective on the date executed by such customer, unless another effective date is otherwise agreed to by the Administrator and the customer.

(4) An initial contract with an electric utility customer pursuant to subsection (c) shall be effective on the date executed by such customer, but no earlier than the first day of the tenth month after the effective date of this Act.

(5) An initial contract with a direct service industrial customer pursuant to subsection (d)(1)(A), shall be effective on the date agreed upon by the Administrator and such customer, but no later than the first day of the tenth month after the effective date of this Act. When such contract is executed, it may for rate purposes be given retroactive effect to such first day.

(6) Initial contracts offered public body, cooperative and Federal agency customers in accordance with this subsection shall provide that during a period of insufficiency declared in accordance with subsection (b) each customer's contractual entitlement shall, to the extent of its requirements on the Administrator, be no less than the amount of firm power received from the Administrator in the year immediately preceding the period of insufficiency.

(7) The Administrator shall be deemed to have sufficient resources for the purpose of entering into the initial contracts specified in paragraph (1)(A) through (D).

CONSERVATION AND RESOURCE ACQUISITION

SECTION 6. (a)(1) The Administrator shall acquire such resources, through conservation, implement all such conservation measures, and acquire such renewable resources which are installed by a residential or small commercial consumer to reduce load, as the Administrator determines are consistent with the criteria of section 4(e)(1) and the considerations of section 4(e)(2) and, in the case of major resources, in accordance with subsection (c). Such conservation measures and such resources may include, but are not limited to —

(A) loans and grants to consumers for insulation or weatherization, increased system efficiency, and waste energy recovery by direct application,

(B) technical and financial assistance to, and other cooperation with, the Administrator's customers and governmental authorities to encourage maximum cost-effective voluntary conservation and the attainment of any cost-effective conservation objectives adopted by individual States or subdivisions thereof,

(C) aiding the Administrator's customers and governmental authorities in implementing model conservation standards adopted pursuant to section 4(f), and

(D) conducting demonstration projects to determine the cost effectiveness of conservation measures and direct application of renewable energy resources.

(2) If a plan is in effect, the Administrator shall acquire such resources through conservation and use of renewable resources and implement such conservation measures which are referred to in paragraph (1) as he determines to be consistent with the plan and, in the case of major resources, in accordance with subsection (c).

(3) In addition to electric power acquired on a short-term basis pursuant to section 11(b)(6)(i) of the Federal Columbia River Transmission System Act (16 U.S.C. 838 and following), the Administrator shall meet his contractual obligations that remain after taking into account planned savings from conservation and conservation measures as provided in this subsection by acquiring sufficient resources.

(b)(1) Except as specifically provided in this section, acquisition of resources under this Act shall be consistent with the plan, as determined by the Administrator.

(2) The Administrator may acquire resources under this Act which are not consistent with the plan, but which are determined by the Administrator to be consistent with the criteria of section 4(e)(1) and the considerations of sec-

tion 4(e)(2). Such determinations are subject to the provisions of section 4(i).

(3) If no plan is in effect, the Administrator may acquire resources under this Act which are determined by the Administrator to be consistent with the criteria of section 4(e)(1) and the considerations of section 4(e)(2).

(4) The Administrator shall acquire any non-Federal resources to replace Federal base system resources only in accordance with the provisions of this section.

(5) Notwithstanding any acquisition of resources pursuant to this section, the Administrator shall not reduce his efforts to achieve conservation pursuant to subsection (a).

(c)(1) For each proposal under subsections (a), (f), (h), or (l) to acquire a major resource, to implement a conservation measure which will conserve an amount of electric power equivalent to that of a major resource, to pay or reimburse investigation and preconstruction expenses of the sponsors of a major resource, or to grant billing credits or services involving a major resource, the Administrator shall —

(A) publish notice of the proposed action in the Federal Register and provide a copy of such notice to the Council, the Governor of each State in which facilities would be constructed or a conservation measure implemented, and the Administrator's customers;

(B) not less than sixty days following publication of such notice, conduct one or more public hearings, presided over by a hearing officer, at which testimony and evidence shall be received, with opportunity for such rebuttal and cross-examination as the hearing officer deems appropriate in the development of an adequate hearing record;

(C) develop a record to assist in evaluating the proposal which shall include the transcript of the public hearings, together with exhibits, and such other ma-

terials and information as may have been submitted to, or developed by, the Administrator; and

(D) following completion of such hearings, promptly provide to the Council and make public a written decision that includes, in addition to a determination respecting the requirements of subsection (a), (f), (h), (l), or (m), as appropriate —

(i) if a plan is in effect, a finding that the proposal is either consistent or inconsistent with the plan or, notwithstanding its inconsistency with the plan, a finding that it is needed to meet the Administrator's obligations under this Act, or

(ii) if no plan is in effect, a finding that the proposal is either consistent or inconsistent with the criteria of section 4(e)(1) and the considerations of section 4(e)(2).

In the case of subsection (f), such decision shall be treated as satisfying the requirements of subsection (f), if it includes a finding of probable consistency, based upon the Administrator's evaluation of information available at the time of completion of the hearing under this paragraph. Such decision shall include the reasons for such finding.

(2) Where a plan is in effect the Council may determine by a majority vote of all the members appointed to the Council, and notify the Administrator, that a proposal referred to in paragraph (1) is either consistent or inconsistent with the plan. If the Council fails to make such determination within sixty days after receipt of an Administrator's decision under paragraph (1)(D), the Council shall be deemed to have determined that the decision is consistent with the plan.

(3) The Administrator may not implement any proposal referred to in paragraph (1) that is determined by either the Administrator or the Council to be inconsistent with

the plan until the expenditure of funds for that purpose has been specifically authorized by Act of Congress.

(4) Before the Administrator implements any proposal referred to in paragraph (1) which has been determined to be consistent with the plan or with the criteria of section 4(e)(1) and the considerations of section 4(e)(2), the Administrator shall —

(A) submit to the appropriate committees of the Congress the administrative record of the decision (including any determination by the Council under paragraph (2)) and a statement of the procedures followed or to be followed for compliance with the National Environmental Policy Act of 1969,

(B) publish notice of the decision in the Federal Register, and

(C) note the proposal in the Administrator's annual or supplementary budget submittal made pursuant to the Federal Columbia River Transmission System Act (16 U.S.C. 838 and following).

The Administrator may not implement any such proposal until 90 days after the date on which such proposal has been noted in such budget.

(d) The Administrator is authorized to acquire a resource, other than a major resource, whether or not such resource meets the criteria of section 4(e)(1) and the considerations of section 4(e)(2) but which he determines is an experimental, developmental, demonstration, or pilot project of a type with a potential for providing cost-effective service to the region. The Administrator shall make no obligation for the acquisition of such resource until it is included in the annual budgets submitted to the Congress pursuant to the Federal Columbia River Transmission System Act.

(e)(1) In order to effectuate the priority given to conservation measures and renewable resources under this

Act, the Administrator shall, to the maximum extent practicable, make use of his authorities under this Act to acquire conservation measures and renewable resources, to implement conservation measures, and to provide credits and technical and financial assistance for the development and implementation of such resources and measures (including the funding of, and the securing of debt for, expenses incurred during the investigation and preconstruction of resources, as authorized in subsection (f)).

(2) To the extent conservation measures or acquisition of resources require direct arrangements with consumers, the Administrator shall make maximum practicable use of customers and local entities capable of administering and carrying out such arrangements.

(f)(1) For resources which the Administrator determines may be eligible for acquisition under this section and satisfy the criteria of section 4(e)(1) and the considerations of section 4(e)(2) or, if a plan is in effect, to be consistent with the plan, the Administrator is authorized to enter into agreements with sponsors of —

(A) a renewable resource, other than a major resource, to fund or secure debt incurred in the investigation and initial development of such resource, or

(B) any other resource to provide for the reimbursement of the sponsor's investigation and preconstruction expenses concerning such resource (which expenses shall not include procurement of capital equipment or construction material for such resource).

In the case of any resource referred to in subparagraph (B), such reimbursement is authorized only if, for unforeseeable reasons —

(i) such resource is subsequently denied State siting approval or other necessary Federal or State permits, or approvals,

(ii) such investigation subsequently demonstrates, as determined by the Administrator, that such resource

does not meet the criteria of section 4(e)(1) and the considerations of section 4(e)(2) or is not acceptable because of environmental impacts, or

(iii) after such investigation the Administrator determines not to acquire the resource and the sponsor determines not to construct the resource.

(2) The Administrator may exercise the authority of this subsection only after he determines that the failure to do so would result in extreme or unusual hardship. The Administrator may provide reimbursement under this subsection only for expenses incurred after the date of the enactment of this Act.

(3) Any agreement under paragraph (1) shall provide the Administrator an option to acquire any such resource, including a renewable resource, and shall include such other provisions, as the Administrator deems appropriate, for the Administrator's recovery from such sponsors or any assignee of the sponsors, if such sponsor or assignee continues development of the resource, of any advances made by the Administrator pursuant to such agreement.

(4) The Administrator shall not reimburse any expense incurred by the sponsors (except necessary expenses involved in the liquidation of the resource) after the date of a final denial of application for State siting approval or after the date the Administrator determines that the resource to be inconsistent with the plan or the criteria of section 4(e)(1) and the considerations of section 4(e)(2).

(g) At the request of the appropriate State, any environmental impact statement which may be required with respect to a resource, to the extent determined possible by the Administrator in accordance with applicable law and regulations, may be prepared jointly and in coordination with any required environmental impact statement of the State or any other statement which serves the purpose of an environmental impact statement which is required by State law.

(h)(1) If a customer so requests, the Administrator shall grant billing credits to such customer, and provide services to such customer at rates established for such services, for —

(A) conservation activities independently undertaken or continued after the effective date of this Act by such customer or political subdivision served by such customer which reduce the obligation of the Administrator that would otherwise have existed to acquire other resources under this Act, or

(B) resources constructed, completed, or acquired after the effective date of this Act by a customer, an entity acting on behalf of such customer, or political subdivision served by the customer which reduce the obligation of the Administrator to acquire resources under this Act. Such resources shall be renewable resources or multipurpose projects or other resources which are not inconsistent with the plan or, in the absence of a plan, not inconsistent with the criteria of section 4(e)(1) and the considerations of section 4 (e)(2).

(2) The Administrator may grant credits for resources other than resources referred to in paragraph (1) which reduce the obligation of the Administrator if he finds the granting of such credits would not be inconsistent with the plan, or if no plan is in effect, not inconsistent with the priorities of section 4(e)(1) and the considerations of section 4(e)(2).

(3) The energy and capacity on which a credit under this subsection to a customer is based shall be the amount by which a conservation activity or resource actually changes the customer's net requirement for supply of electric power or reserves from the Administrator.

(4) The amount of credits for conservation under this subsection shall be set to credit the customer implementing

or continuing the conservation activity for which the credit is granted for the savings resulting from such activity. The rate impact on the Administrator's other customers of granting the credit shall be equal to the rate impact such customers would have experienced had the Administrator been obligated to acquire resources in an amount equal to that actually saved by the activity for which the credit is granted.

(5) For resources other than conservation, the customer shall be credited for net costs actually incurred by such customer, an entity acting on behalf of such customer, or political subdivision served by such customer, in acquiring, constructing, or operating the resource for which the credit is granted. The rate impact to the Administrator's other customers of granting the credit shall be no greater than the rate impact such customers would have experienced had the Administrator been obligated to acquire resources in an amount equal to that actually produced by the resource for which the credit is granted.

(6) Retail rate structures which are voluntarily implemented by the Administrator's customers and which induce conservation or installation of consumer-owned renewable resources shall be considered, for purposes of this subsection, to be (A) conservation activities independently undertaken or carried on by such customers, or (B) customer-owned renewable resources, and shall qualify for billing credits upon the same showing as that required for other conservation or renewable resource activities.

(7) Prior to granting any credit or services pursuant to this subsection, the Administrator shall notify the Council and his customers of the credit or services applied for, inform them of the methodology the Administrator proposes to use in determining the amount of any credit the Administrator may grant, and permit them a reasonable opportunity, consistent with the provisions of this Act, to evaluate and comment upon the credit and service proposal.

(i) Contracts for the acquisition of resources and for billing credits for major resources, including conservation activities, entered into pursuant to this section shall contain such terms and conditions as will insure timely construction, scheduling, completion, and operation of resources, to insure that the costs of any acquisition are as low as reasonably possible, consistent with sound engineering, operating, and safety practices, and to insure that the Administrator exercises effective oversight, inspection, audit, and review of all aspects of such construction and operation. Such contracts shall contain provisions assuring that the Administrator has the authority to approve all costs and proposals for major modifications in construction or in scheduling or in operations and to assure that the Administrator is provided with such current information as he deems necessary to evaluate such construction and operation.

(j)(1) All contractual and other obligations required to be carried out by the Administrator pursuant to this Act shall be secured solely by the Administrator's revenues received from the sale of electric power and other services. Such obligations are not, nor shall they be construed to be, general obligations of the United States, nor are such obligations intended to be or are they secured by the full faith and credit of the United States.

(2) All contracts entered into by the Administrator for the acquisition of resources pursuant to this Act shall require that, in the sale of any obligations, all offerings and promotional material for the sale of such obligations shall include the language contained in the second sentence of paragraph (1). The Administrator shall monitor and enforce such requirement.

(k) In the exercise of his authorities pursuant to this section, the Administrator shall, consistent with the provisions of this Act and the Administrator's obligations to particular customer classes, insure that benefits under this section, including financial and technical assistance, con-

duct of conservation demonstrations, and experimental projects, services, and billing credits, are distributed equitably throughout the region.

(1)(1) The Administrator is authorized and directed to investigate opportunities for adding to the region's resources or reducing the region's power costs through the accelerated or cooperative development of resources located outside the States of Idaho, Montana, Oregon, and Washington if such resources are renewable resources, and are now or in the future planned or considered for eventual development by nonregional agencies or authorities that will or would own, sponsor, or otherwise develop them. The Administrator shall keep the Council fully and currently informed of such investigations, and seek the Council's advice as to the desirability of pursuing such investigations.

(2) The Administrator is authorized and directed to investigate periodically opportunities for mutually beneficial interregional exchanges of electric power that reduce the need for additional generation or generating capacity in the Pacific Northwest and the regions with which such exchanges may occur. The Council shall take into consideration in formulating a plan such investigations.

(3) After the Administrator submits a report to Congress pursuant to paragraph (5), the Administrator is authorized to acquire resources consistent with such investigations and consistent with the plan or, if no plan is in effect, with the priorities of section 4(e)(1) and the considerations of section 4(e)(2). Such acquisitions shall be in accordance with the provisions of this subsection.

(4) The Administrator shall conduct the investigations and the acquisitions, if any, authorized under this subsection with the assistance of other Federal agencies as may be appropriate.

(5) No later than July 1, 1981, the Administrator shall submit to the Congress a report of the results of the inves-

tigations undertaken pursuant to this subsection, together with the prospects for obtaining additional resources under the authority granted by this subsection and for reductions in generation or generating capacity through exchanges.

(m) Except as to resources under construction on the effective date of this Act, the Administrator shall determine in each case of a major resource acquisition that a reasonable share of the particular resource, or a reasonable equivalent, has been offered to each Pacific Northwest electric utility for ownership, participation, or other sponsorship, but not in excess of the amounts needed to meet such utility's Regional load.

RATES

Section 7. (a)(1) The Administrator shall establish and periodically review and revise, rates for the sale and disposition of electric energy and capacity and for the transmission of non-Federal power. Such rates shall be established and, as appropriate, revised to recover, in accordance with sound business principles, the costs associated with the acquisition, conservation, and transmission of electric power, including the amortization of the Federal investment in the Federal Columbia River Power System (including irrigation costs required to be repaid out of power revenues) over a reasonable period of years and the other costs and expenses incurred by the Administrator pursuant to this Act and other provisions of law. Such rates shall be established in accordance with sections 9 and 10 of the Federal Columbia River Transmission System Act (16 U.S.C. 838), section 5 of the Flood Control Act of 1944, and the provisions of this Act. (2) Rates established under this section shall become effective only upon confirmation and approval by the Federal Energy Regulatory Commission upon a finding by the Commission, that such rates —

(A) are sufficient to assure repayment of the Federal investment in the Federal Columbia River Power

System over a reasonable number of years after first meeting the Administrator's other costs,

(B) are based upon the Administrator's total System costs, and

(C) insofar as transmission rates are concerned, equitably allocate the costs of the Federal transmission system between Federal and non-Federal power utilizing such system.

(b)(1) The Administrator shall establish a rate or rates of general application for electric power sold to meet the general requirements of public body, cooperative, and Federal agency customers within the Pacific Northwest, and loads of electric utilities under section 5(c). Such rate or rates shall recover the costs of that portion of the Federal base system resources needed to supply such loads until such sales exceed the Federal base system resources. Thereafter, such rate or rates shall recover the cost of additional electric power as needed to supply such loads, first from the electric power acquired by the Administrator under section 5(c) and then from other resources.

(2) After July 1, 1985, the projected amounts to be charged for firm power for the combined general requirements of public body, cooperative and Federal agency customers, exclusive of amounts charged such customers under subsection (g) for the costs of conservation, resource and conservation credits, experimental resources and uncontrollable events, may not exceed in total, as determined by the Administrator, during any year after July 1, 1985, plus the ensuing four years, an amount equal to the power costs for general requirements of such customers if, the Administrator assumes that —

(A) the public body and cooperative customers' general requirements had included during such five-year period the direct service industrial customer loads which are —

(i) served by the Administrator, and

(ii) located within or adjacent to the geographic service boundaries of such public bodies and cooperatives;

(B) public body, cooperative, and Federal agency customers were served, during such five-year period, with Federal base system resources not obligated to other entities under contracts existing as of the effective date of this Act (during the remaining term of such contracts) excluding obligations to direct service industrial customer loads included in subparagraph (A);

(C) no purchases or sales by the Administrator as provided in section 5(c) were made during such five-year period;

(D) all resources that would have been required, during such five-year period, to meet remaining general requirements of the public body, cooperative and Federal agency customers (other than requirements met by the available Federal base system resources determined under subparagraph (B)) were

(i) purchased from such customers by the Administrator pursuant to section 6, or

(ii) not committed to load pursuant to section 5(b),

and were the least expensive resources owned or purchased by public bodies or cooperatives; and any additional needed resources were obtained at the average cost of all other new resources acquired by the Administrator; and

(E) the quantifiable monetary savings, during such five-year period, to public body, cooperative and Federal agency customers resulting from —

(i) reduced public body and cooperative financing costs as applied to the total amount of re-

sources, other than Federal base system resources, identified under subparagraph (D), and

(ii) reserve benefits as a result of the Administrator's actions under this Act

were not achieved.

(3) Any amounts not charged to public body, cooperative, and Federal agency customers by reason of paragraph (2) shall be recovered through supplemental rate charges for all other power sold by the Administrator to all customers. Rates charged public body, cooperative, or Federal agency customers pursuant to this subsection shall not include any costs or benefits of a net revenue surplus or deficiency occurring for the period ending June 30, 1985, to the extent such surplus or deficiency is caused by —

(A) a difference between actual power deliveries and power deliveries projected for the purpose of establishing rates to direct service industrial customers under subsection (c)(1), and

(B) an overrecovery or underrecovery of the net costs incurred by the Administrator under section 5(c) as a result of such difference.

Any such revenue surplus or deficiency incurred shall be recovered from, or repaid to, customers over a reasonable period of time after July 1, 1985, through a supplemental rate charge or credit applied proportionately for all other power sold by the Administrator at rates established under other subsections of this section prior to July 1, 1985.

(4) The term "general requirements" as used in this section means the public body, cooperative or Federal agency customer's electric power purchased from the Administrator under section 5(b), exclusive of any new large single load.

(c)(1) The rate or rates applicable to direct service industrial customers shall be established —

(A) for the period prior to July 1, 1985, at a level which the Administrator estimates will be sufficient to

recover the cost of resources the Administrator determines are required to serve such customers' load and the net costs incurred by the Administrator pursuant to section 5(c), based upon the Administrator's projected ability to make power available to such customers pursuant to their contracts, to the extent that such costs are not recovered through rates applicable to other customers; and

(B) for the period beginning July 1, 1985, at a level which the Administrator determines to be equitable in relation to the retail rates charged by the public body and cooperative customers to their industrial consumers in the region.

(2) The determination under paragraph (1)(B) shall be based upon the Administrator's applicable wholesale rates to such public body and cooperative customers and the typical margins included by such public body and cooperative customers in their retail industrial rates but shall take into account —

(A) the comparative size and character of the loads served,

(B) the relative costs of electric capacity, energy, transmission, and related delivery facilities provided and other service provisions, and

(C) direct and indirect overhead costs, all as related to the delivery of power to industrial customers, except that the Administrator's rates during such period shall in no event be less than the rates in effect for the contract year ending on June 30, 1985.

(3) The Administrator shall adjust such rates to take into account the value of power system reserves made available to the Administrator through his rights to interrupt or curtail service to such direct service industrial customers.

(d) In order to avoid adverse impacts on retail rates of the Administrator's customers with low system densities,

the Administrator shall, to the extent appropriate, apply discounts to the rate or rates for such customers.

(e) Nothing in this Act prohibits the Administrator from establishing, in rate schedules of general application, a uniform rate or rates for sale of peaking capacity or from establishing time-of-day, seasonal rates, or other rate forms.

(f) Rates for all other firm power sold by the Administrator for use in the Pacific Northwest shall be based upon the cost of the portions of Federal base system resources, purchases of power under section 5(c) and additional resources which, in the determination of the Administrator, are applicable to such sales.

(g) Except to the extent that the allocation of costs and benefits is governed by provisions of law in effect on the effective date of this Act, or by other provisions of this section, the Administrator shall equitably allocate to power rates, in accordance with generally accepted ratemaking principles and the provisions of this Act, all costs and benefits not otherwise allocated under this section, including, but not limited to, conservation, fish and wildlife, uncontrollable events, reserves, the excess costs of experimental resources acquired under section 6, the cost of credits granted pursuant to section 6, operating services, and the sale of or inability to sell excess electric power.

(h) Notwithstanding any other provision of this section (except the provisions of subsection (a)), the Administrator shall adjust power rates to include any surcharges arising under section 4(f), and shall allocate any revenues from such charges in such manner as the Administrator determines will help achieve the purposes of section 4(f).

(i) In establishing rates under this section, the Administrator shall use the following procedures:

(1) Notice of the proposed rates shall be published in the Federal Register with a statement of the justification and reasons supporting such rates. Such notice

shall include a date for a hearing in accordance with paragraph (2).

(2) One or more hearings shall be conducted as expeditiously as practicable by a hearing officer to develop a full and complete record and to receive public comment in the form of written and oral presentation of views, data, questions, and argument related to such proposed rates. In any such hearing —

(A) any person shall be provided an adequate opportunity by the hearing officer to offer refutation or rebuttal of any material submitted by any other person or the Administrator, and

(B) the hearing officer, in his discretion, may allow for cross-examination to develop information and material relevant to any such proposed rate.

(3) In addition to the opportunity to submit oral and written material at the hearings, any written views, data, questions, and arguments submitted by persons prior to, or before, the close of hearings shall be made a part of the administrative record.

(4) After such a hearing, the Administrator may propose revised rates, publish such proposed rates in the Federal Register, and conduct additional hearings in accordance with this subsection.

(5) The Administrator shall make a final decision establishing a rate or rates based on the record which shall include the hearing transcript, together with exhibits, and such other materials and information as may have been submitted to, or developed by, the Administrator. The decision shall include a full and complete justification of the final rates pursuant to this section.

(6) The final decision of the Administrator shall become effective on confirmation and approval of such rates by the Federal Energy Regulatory Commission pursuant to subsection (a)(2). The Commission shall

have the authority, in accordance with such procedures as the Commission may establish, to approve the final rate submitted by the Administrator on an interim basis, pending the Commission's final decision in accordance with such subsection.

(j) All rate schedules adopted, and all power billings rendered, by the Administrator pursuant to this section shall indicate —

(1) the approximate cost contribution of different resource categories to the Administrator's rates for the sale of energy and capacity, and

(2) the cost of resources acquired to meet load growth within the region and the relation of such cost to the average cost of resources available to the Administrator.

(k) Notwithstanding any other provision of this Act, all rates or rate schedules for the sale of nonfirm electric power within the United States, but outside the region, shall be established after the date of this Act by the Administrator in accordance with the procedures of subsection (i) of this section (other than the first sentence of paragraph (6) thereof) and in accordance with the Bonneville Project Act, the Flood Control Act of 1944, and the Federal Columbia River Transmission System Act. Notwithstanding section 201(f) of the Federal Power Act. Such rates or rate schedules shall become effective after review by the Federal Energy Regulatory Commission for conformance with the requirements of such Acts and after approval thereof by the Commission. Such review shall be based on the record of proceedings established under subsection (i) and this subsection. The parties to such proceedings under subsection (i) shall be afforded an opportunity by the Commission for an additional hearing in accordance with the procedures established for ratemaking by the Commission pursuant to the Federal Power Act.

(1) In order to further the purposes of this Act and to protect the consumers of the region, the Administrator may negotiate, or establish, rates for electric power sold by the Administrator to any entity not located in the United States which shall be equitable in relation to rates for all electric power which is, or may be, purchased by the Administrator or the Administrator's customers from entities outside the United States. In establishing rates other than by negotiation, the provisions of subsection (i) shall apply. In the case of any negotiation with an entity not located in the United States, the Administrator shall provide public notice of any proposal to negotiate such rates. Such negotiated rates shall be not less than the rates established under this Act for nonfirm power sold within the United States but outside the region. The Administrator shall also afford notice of any rates negotiated pursuant to this subsection.

AMENDMENTS TO EXISTING LAW

Section 8. (a) Section 11(b) of the Federal Columbia River Transmission System Act (16 U.S.C. 838) is amended by striking out "and" at the end of paragraph (10), by striking out the period at the end of paragraph (11) and inserting in lieu thereof "; and", and by adding at the end thereof the following new paragraph:

"(12) making such payments, as shall be required to carry out the purposes and provisions of the Pacific Northwest Electric Power Planning and Conservation Act".

(b) Subsection (b) of section 13 of such Act is amended by striking out "and 11(b)(11)" and inserting in lieu thereof ", 11(b)(11), and 11(b)(12)".

(c)(1) The first sentence of subsection (a) of section 13 of such Act is amended by inserting after the word "system," the following: "to implement the Administrator's authority pursuant to the Pacific Northwest Electric

Power Planning and Conservation Act (including his authority to provide financial assistance for conservation measures, renewable resources, and fish and wildlife, but not including the authority to acquire under section 6 of that Act electric power from a generating facility having a planned capability greater than 50 average megawatts),”.

(2) The fourth sentence of such subsection (a) is amended by inserting the following before the period at the end thereof: “issued by Government corporations”.

(3) Such subsection (a) is further amended by inserting the following before the period at the end thereof: “prior to October 1, 1981. Such aggregate principal limitation shall be increased by an additional \$1,250,000,000 after October 1, 1981, as provided in annual appropriation Acts, and such increased amount shall be reserved for the purpose of providing funds for conservation and renewable resource loans and grants in a special revolving account created therefor in the Fund. The funds from such revolving account shall not be deemed State or local funds”.

(d) Clause (2) of section 1(b) of the Act of August 31, 1964 (78 Stat. 756) is amended to read as follows: “(2) any contiguous areas, not in excess of seventy-five airline miles from said region, which are a part of the service area of a rural electric cooperative served by the Administrator on the effective date of the Pacific Northwest Electric Power Planning and Conservation Act, which has a distribution system from which it serves both within and without said region.”

ADMINISTRATIVE PROVISIONS

Section 9. (a) Subject to the provisions of this Act and other applicable provisions of law, the Administrator is authorized to contract in accordance with section 2(f) of the Bonneville Project Act of 1937 (16 U.S.C. 832a(f)).

(b) The Administrator shall discharge the executive and administrative functions of his office in accordance with the policy established by the Bonneville Project Act of 1937 (16 U.S.C. 832 and following), sections 302(a)(2) and (3) of the Department of Energy Organization Act, and this Act. The Secretary of Energy, the Council, and the Administrator shall take such steps as are necessary to assure the timely implementation of this Act in a sound and businesslike manner.

(c) Any contract of the Administrator for the sale or exchange of electric power for use outside the Pacific Northwest shall be subject to limitations and conditions corresponding to those provided in sections 2 and 3 of the Act of August 31, 1964 (16 U.S.C. 837a and 837b) for any contract for the sale, delivery, or exchange of hydroelectric energy or peaking capacity generated within the Pacific Northwest for use outside the Pacific Northwest. In applying such sections for the purposes of this subsection, the term "surplus energy" shall mean electric energy for which there is no market in the Pacific Northwest at any rate established for the disposition of such energy, and the term "surplus peaking capacity" shall mean electric peaking capacity for which there is no demand in the Pacific Northwest at the rate established for the disposition of such capacity. The authority granted, and duties imposed upon, the Secretary by sections 5 and 7 of such Act (16 U.S.C. 837e and 837f) shall also apply to the Administrator in connection with resources acquired by the Administrator pursuant to this Act. The Administrator shall, in making any determination, under any contract executed pursuant to section 5, of the electric power requirements of any Pacific Northwest customer, which is a non-Federal entity having its own generation, exclude, in addition to hydroelectric generated energy excluded from such requirements pursuant to section 3(d) of such Act (16 U.S.C. 837b(d)), any amount of energy included in the resources of such customer for service to firm loads in the region if (1) such

amount was disposed of by such customer outside the region, and (2) as a result of such disposition, the firm energy requirements of such customer or other customers of the Administrator are increased. Such amount of energy shall not be excluded, if the Administrator determines that through reasonable measures such amount of energy could not be conserved or otherwise retained for service to regional loads. The Administrator may sell as replacement for any amount of energy so excluded only energy that would otherwise be surplus.

(d)(1) For purposes of sections 701 through 706 of title 5, United States Code, the following actions shall be final actions subject to judicial review —

(A) adoption of the plan or amendments thereto by the Council under section 4, and any determination by the Council under section 4(h);

(B) a decision by the Administrator under section 4(j);

(C) sales, exchanges, and purchases of electric power under section 5;

(D) the Administrator's acquisition of resources under section 6;

(E) implementation of conservation measures under section 6;

(F) execution of contracts for assistance to sponsors under section 6(f);

(G) granting of credits under section 6(h); and

(H) final rate determination under section 7.

(2) The record upon review of such final actions shall be limited to the administrative record compiled in accordance with this Act. The scope of review of such actions without a hearing or after a hearing shall be governed by section 706, other than 706(2)(E) and (F), of title 5, United States Code, except that final determinations regarding rates un-

der section 7 shall be supported by substantial evidence in the rulemaking record required by section 7(i) considered as a whole. The scope of review of an action under section 6(c) shall be governed by section 706 of title 5, United States Code. Nothing in this section shall be construed to require a hearing pursuant to section 554 or 557 of title 5 of the United States Code.

(3) Nothing in this section shall be construed to preclude judicial review of other final actions and decisions by the Council or Administrator.

(4) For purposes of this subsection —

(A) major resources shall be deemed to be acquired upon publication in the Federal Register pursuant to section 6(c)(4)(B);

(B) resources, other than major resources, shall be deemed to be acquired upon execution of the contract therefor;

(C) conservation measures shall be deemed to be implemented upon execution of the contract or grant therefor; and

(D) rate determinations pursuant to section 7 shall be deemed final upon confirmation and approval by the Federal Energy Regulatory Commission.

(5) Suits to challenge final actions and decisions taken pursuant to this Act, or the implementation of such final actions, whether brought pursuant to this Act, the Bonneville Project Act, the Act of August 31, 1964 (16 U.S.C. 837-837h), or the Federal Columbia River Transmission System Act (16 U.S.C. 838 and following), shall be filed in the appropriate Federal court in the case of rates under section 7 and in the United States court of appeals for the region in the case of other actions or decisions subject to the provisions of this subsection. Such suits shall be filed within ninety days of the time such action or decision is deemed final, or, if notice of the action is required by this

Act to be published in the Federal Register, within ninety days from such notice, or be barred. In the case of a challenge of the plan or amendments thereto, such suit shall be filed within sixty days after publication of a notice of such final action in the Federal Register. Such courts shall have jurisdiction to hear and determine any suit brought as provided in this section. The plan, as finally adopted or portions thereof, or amendments thereto, shall not thereafter be reviewable as a part of any other section under this Act or any other law administered by the Administrator.

(e) For purposes of enabling the Administrator to acquire resources necessary to meet the firm load of public bodies, cooperatives, and Federal agencies from a governmental unit at a cost no greater than the cost which would be applicable in the absence of such acquisition, the exemption from gross income of interest on certain governmental obligations provided in section 103(a)(1) of the Internal Revenue Code of 1954 shall not be affected by the Administrator's acquisition of such resources if —

(1) the Administrator, prior to contracting for such acquisition, certifies to his reasonable belief, that the persons for whom the Administrator is acquiring such resources for sale pursuant to section 5 of this Act are public bodies, cooperatives, and Federal agencies, unless the Administrator also certifies that he is unable to acquire such resources without selling a portion thereof to persons who are not exempt persons (as defined in section 103(b) of such Code), and

(2) based upon such certification, the Secretary of the Treasury determines in accordance with applicable regulations that less than a major portion of the resource is to be furnished to persons who are not exempt persons (as defined in section 103(b) of such Code).

The certification under paragraph (1) shall be made in accordance with this subsection and a procedure and methodology approved by the Secretary of the Treasury.

For purposes of this subsection, the term "major portion" shall have the meaning provided by regulations issued by the Secretary of the Treasury.

(f) When reviewing rates for the sale of power to the Administrator by an investor-owned utility customer under sections 5(c) or 6, the Federal Energy Regulatory Commission shall, in accordance with section 209 of the Federal Power Act (16 U.S.C. 824h),

- (1) convene a joint State board and

- (2) invest such board with such duties and authority as will assist the Commission in its review of such rates.

(g)(1) No "company" (as defined in section 2(a)(2) of the Public Utility Holding Company Act of 1935; 15 U.S.C. 79b(a)(2), which owns or operates facilities for the generation of electricity (together with associated transmission and other facilities) primarily for sale to the Administrator under section 6 shall be deemed an "electric utility company" (as defined in section 2(a)(3) of the Public Utility Holding Company Act of 1935; 15 U.S.C. 79b(a)(3)), within the meaning of any provision or provisions of chapter 2C of title 15 of the United States Code, if at least 90 per centum of the electricity generated by such company is sold to the Administrator under section 6, and if —

- (A) the organization of such company is consistent with the policies of the Public Utility Holding Company Act of 1935, as determined by the Securities and Exchange Commission, with the concurrence of the Administrator, at the time of such organization; and

- (B) participation in any facilities of such "company" has been offered to public bodies and cooperatives in the region pursuant to section 6(m), and

(2) The Administrator shall include in any contract for the acquisition of a major resource from such "company" provisions limiting the amount of equity investment, if any, in such "company" to that which the Administrator deter-

mines will be consistent with achieving the lowest attainable power costs attributable to such major resource.

(3) In the case of any "company" which meets the requirements of paragraph (1), the Administrator, with the concurrence of such Commission, shall approve all significant contracts entered into by, and between, such "company" and any sponsor company or any subsidiary of such sponsor company which are determined to be consistent with the policy of the Public Utility Holding Company Act of 1935 at the time such contracts are entered into. The Administrator and the Securities and Exchange Commission shall exercise such approval authority within sixty days after receipt of such contracts. Such contracts shall not be effective without such approval.

(4) Paragraph (1) of this subsection shall continue to apply to any such "company" unless the Administrator or the Securities and Exchange Commission, or both, through periodic review, (A) determine at any time that the "company" no longer operates in a manner consistent with the policy of the Public Utility Holding Company Act of 1935 and in accordance with this subsection, and (B) notify the "company" in writing of such preliminary determination. This subsection shall cease to apply to such "company" thirty days after receipt of notification of a final determination thereof. A final determination shall be made only after public notice of the preliminary determination and after a hearing completed not later than sixty days from the date of publication of such notice. Such final determination shall be made within thirty days after the date of completion of such hearing.

(h)(1) At the request and expense of any customer or group of customers of the Administrator within the Pacific Northwest, the Administrator shall, to the extent practicable —

(A) acquire any electric power required by (i)
any customer or group of customers to enable them to

replace resources determined to serve firm load under section 5(b), or (ii) direct service industrial customers to replace electric power that is or may be curtailed or interrupted by the Administrator (other than power the Administrator is obligated to replace), with the cost of such replacement power to be distributed among the direct service industrial customers requesting such power; and

(B) dispose of, or assist in the disposal of, any electric power that a customer or group of customers proposes to sell within or without the region at rates and upon terms specified by such customer or group of customers, if such disposition is not in conflict with the Administrator's other marketing obligations and the policies of this Act and other applicable laws.

(2) In implementing the provisions of subparagraphs (A) and (B) of paragraph (1), the Administrator may prescribe policies and conditions for the independent acquisition or disposition of electric power by any direct service industrial customer or group of such customers for the purpose of assuring each direct service industrial customer an opportunity to participate in such acquisition or disposition.

(3) The Administrator shall furnish services including transmission, storage, and load factoring unless he determines such services cannot be furnished without substantial interference with his power marketing program, applicable operating limitations or existing contractual obligations. The Administrator shall, to the extent practicable, give priority in making such services available for the marketing, within and without the Pacific Northwest, of capability from projects under construction on the effective date of this Act, if such capability has been offered for sale at cost, including a reasonable rate of return, to the Administrator pursuant to this Act and such offer is not accepted within one year.

(i)(1) The Council, as soon as practicable after the enactment of this Act, shall prepare, in consultation with

the Administrator, the customers, appropriate State regulatory bodies, and the public, a report and shall make recommendations with respect to the various retail rate designs which will encourage conservation and efficient use of electric energy and the installation of consumer-owned renewable resources on a cost-effective basis, as well as areas for research and development for possible application to retail utility rates within the region. Studies undertaken pursuant to this subsection shall not affect the responsibilities of any customer or the Administrator which may exist under the Public Utility Regulatory Policies Act of 1978.

(2) Upon request, and solely on behalf of customers so requesting, the Administrator is authorized to (A) provide assistance in analyzing and developing retail rate structures that will encourage cost-effective conservation and the installation of cost-effective consumer-owned renewable resources; (B) provide estimates of the probable power savings and the probable amount of billing credits under section 6(h) that might be realized by such customers as a result of adopting and implementing such retail rate structures; and (C) solicit additional information and analytical assistance from appropriate State regulatory bodies and the Administrator's other customers.

(j) There is hereby established within the administration an Assistant Administrator position for conservation and renewable resources. Such Assistant Administrator shall be appointed by the Administrator and shall be assigned responsibility for conservation and direct-application renewable resource programs (including the administration of financial assistance for such programs). Such position is hereby established in the senior executive service in addition to the number of such positions heretofore established in accordance with other provisions of law applicable to such positions.

SAVINGS PROVISIONS

SECTION 10. (a) Nothing in this Act shall be construed to affect or modify any right of any State or political subdivision thereof or electric utility to —

(1) determine retail electric rates, except as provided by section 5(c)(3);

(2) develop and implement plans and programs for the conservation, development, and use of resources; or

(3) make energy facility siting decisions, including, but not limited to, determining the need for a particular facility, evaluating alternative sites, and considering alternative methods of meeting the determined need.

(b) Nothing in this Act shall alter, diminish, or abridge the rights and obligations of the Administrator or any customer under any contract existing as of the effective date of this Act.

(c) Nothing in this Act shall alter, diminish, abridge, or otherwise affect the provisions of other Federal laws by which public bodies and cooperatives are entitled to preference and priority in the sale of federally generated electric power.

(d) If any provision of this Act is found to be unconstitutional, then any contract entered into by the Administrator, prior to such finding and in accordance with such provisions, to sell power, acquire or credit resources, or to reimburse investigation and preconstruction expenses pursuant to section 5, and section 6 (a), (f) or (h) of this Act shall not be affected by such finding.

(e) Nothing in this Act shall be construed to affect or modify any treaty or other right of an Indian tribe.

SECTION 11. This Act shall be effective on the date of enactment, or October 1, 1980, whichever is later. The term "date of enactment of this Act" as used in this Act shall be either such date or October 1, 1980.

BACKGROUND AND NEED

The Bonneville Power Administration (BPA) was established in 1937 by the Act of August 20, 1937, generally referred to as the Bonneville Project Act (16 U.S.C. 832, et seq.). Section 2(a) of the 1937 Act provides that the BPA shall dispose of electric energy generated in the operation of the Bonneville Project constructed and operated by the Corps of Engineers. Section 2(b) of the Act also states:

In order to encourage the widest possible use of all electric energy that can be generated and marketed and to provide reasonable outlets therefor, and to prevent the monopolization thereof by limited groups, the administrator is authorized and directed to provide, construct, operate, maintain, and improve such electric transmission lines and substations, and facilities and structures appurtenant thereto, as he finds necessary, desirable, or appropriate for the purpose of transmitting electric energy, available for sale, from the Bonneville project to existing and potential markets, and for the purpose of interchange of electric energy, to interconnect the Bonneville project with other Federal projects and publicly-owned power systems now or hereafter constructed.

The Bonneville Act did not give BPA authority to construct any generation facilities. Instead, Congress authorized the Corps of Engineers and the then Bureau of Reclamation (now Water and Power Resources Service) to construct additional hydro projects in the Pacific Northwest.

Congress has since expanded the BPA statutory authority and responsibilities through the enactment of several other laws, such as Public Law 88-552 (16 U.S.C. 837; et seq.) and the Federal Columbia River Transmission System Act (16 U.S.C. 838, et seq.). The latter established a self-financing fund, called the Bonneville Power Administration fund, for the operation and maintenance of the Federal Columbia River Transmission system, as well as a number of other purposes.

BPA is the marketing agency of Federal hydroelectric power generated from a series of hydro projects built by the Corps of Engineers and the Bureau of Reclamation and located in the Pacific Northwest on the Columbia River and its tributaries. BPA markets this power wholesale to utilities and to direct service industrial customers. BPA's primary service area is the Pacific Northwest, which generally means the States of Oregon and Washington, that portion of Montana west of the Continental Divide, and portions of the States of Nevada, Utah, and Wyoming. This service area is statutorily established in Public Law 88-552 which provides a priority in the sale of BPA power for loads within the region. In marketing power generated at these Federal hydro projects, Congress provided that BPA is unequivocally obliged by statute to "give preference and priority to public bodies and cooperatives" which terms are defined in section 3 of the Bonneville Project Act. Such public bodies and cooperatives are known as "preference customers". S. 885, as amended by this Committee, does not alter in any way that Congressionally-established obligation and priority, nor does the committee intend that the legislation be construed to alter or modify that obligation and priority.

Until the early 1970's, there was a sufficient supply of Federal power to satisfy the net requirements of preference customers, various Federal agencies, investor-owned systems, and certain direct service industrial customers (DSI's). Until that time, the Pacific Northwest enjoyed ample supplies of electricity at very low prices. However, as projected demand began to exceed supplies, the Administrator announced that firm power sales to investor-owned utilities would cease in 1973. The region then began to realize the finite nature of the generating potential of the Columbia River System and the need to find an acceptable way to meet future electric energy demand. Adding to BPA's existing power supply was thought to be the most logical alternative.

However, BPA is not authorized by law to construct additional resources on its own. With sites for baseload hydro-projects essentially exhausted, BPA and the region's electric utilities initiated a hydro-thermal power program to meet future load growth by adding coal-fired and nuclear generating plants owned by non-Federal entities to the Federal system. BPA agreed to participate in paying for the publicly-owned portions of these powerplants through a net-billing arrangement with its preference customers, under which BPA preference customers (utilities participating in the actual construction of these plants) signed agreements which assigned or sold the plant's generating capability to BPA in return for a credit on the BPA charges for the power sales to that utility. Washington Public Power System (WPPSS) plants 1, 2 and 3, now under construction, are financed through the credit established in this way. However, in 1972, the Internal Revenue Service effectively prohibited additional net billed agreements by issuing a regulation denying tax exempt status for future municipal bonds to finance construction of plants whose capability is acquired by Federal agencies. The region then attempted an alternative program, sometimes called "Phase 2" of the hydro thermal program, whereby preference customers agreed to build their own new generation to meet load growth with BPA agreeing to provide the necessary reserves for those systems and serving the DSI's. For a number of reasons, including an unfavorable court decision, this alternative failed.

In June of 1976, BPA recognized that Federal power, including the "net billed" power, would be inadequate to meet the projected needs of its preference customers, and issued Notices of Insufficiency to these customers. This relieved BPA from liability for any failure to satisfy preference customer load growth after July 1, 1983. Similarly, BPA informed its direct service customers that their contracts expiring in the 1981-91 period were not likely to be renewed. In view of this inevitable shortfall in Federal

base resources and with no ability to add to its power supply, BPA began consideration of an administrative allocation so that each qualified customer could obtain an appropriate share of the available resources and plan to meet its needs accordingly.

More than anything else, it was probably the enormous increase in the cost of alternative resources that promises to make the process of allocating these resources so difficult and contentious. The region enjoys the lowest electric rates in the country. BPA is selling wholesale electricity at rates approximating 8 mills per kilowatt, or an equivalent of \$3/barrel oil (even after a recent 90 percent rate increase), whereas investments in thermal based alternative resources could now cost 10 times as much. Each claimant to the BPA supply in the Northwest is vigorously seeking a share of this invaluable resource. The preference customers claim that upon termination of the DSI contracts they are entitled to any power thus freed up. The DSI's are claiming that, if cut off from direct service, they are entitled to service similar to their current service from the appropriate local utility. Ten of the 15 DSI's are located in, or adjacent to, BPA preference customer service areas. These ten make up about 85 percent of the total DSI load.

At the same time, the States are looking for ways to qualify their residential customers for a share of these resources. In this respect, the State of Oregon has formed a "Domestic and Rural Power Authority" (DRPA) which has applied to BPA for an allocation of power. DRPA is intended to qualify as a preference customer in order to obtain low-cost power to serve all residential customers throughout the State. With the incentive becoming greater, more and more groups are considering the formation of new preference customers, among other reasons, for the purpose of qualifying for this power. With stakes so high, no claimant can afford not to attempt to secure an administrative allocation.

So long as this struggle continues (and it is only just beginning) utilities are unable to plan effectively for their future needs. The most important consequence of this failure is that despite certain distinguished programs for conservation, conservation opportunities are being ignored. The opportunity for conservation of electric power in the region is great. Kilowatts saved cost a small fraction of the cost of producing an equivalent amount of kilowatts. All concede that a vast potential for energy conservation is being wasted in the region.

As the costs of new generation have increased, the potential for cost-effective conservation programs in the region have also increased. Unfortunately, the region appears to lack mechanisms to undertake an effective regional conservation effort. BPA has limited authority to carry out conservation programs, and no authority to borrow or underwrite funds to finance these programs. Individual utilities (particularly publicly owned systems) face many legal and practical problems which limit their conservation efforts. Further, under current conditions it could be several years before many customers of BPA preference customers will face the kind of price signals that would encourage them to invest money in cost effective conservation measures.

Coupled with conservation's economic promise is the urgent need to conserve to ease the region's almost certain power shortages in the 1980's. Current forecasts indicate that the Northwest will experience massive power shortages during any critical water year in the next decade even if present construction schedules are met, and the likelihood is very great that those construction schedules will slip still further. Although it is too late to avert such shortages by building new thermal plants it is not too late to reduce the incidence and duration of such shortages through conservation. In the absence of a coordinated regional power program, it is probable that conservation efforts in the region will be too slow, too scattered, and

too modest to be effective; and the region would thus lose a good portion of conservation's potential economic benefits.

The region has turned to the Congress to assist in two requests: (1) the question as to which customers obtain what share of these low-cost Federal resources and (2) to authorize BPA to play a central role in helping to determine how the future electric power needs of this region will be met. The various legislative proposals have involved an expansion of the authority of the Bonneville Power Administration to permit the Administrator to acquire or purchase additional power on a long-term basis. BPA now supplies over half of the electricity to this region on a wholesale basis and maintains the integrated power grid that tends to distinguish this region from others. A grant of additional authority to this agency was generally accepted as the most sensible solution to the region's planning problem and far more acceptable than the alternative of contentious litigation and what the Governor of Washington described as a "regional civil war" over low-cost power. However, no solution to such a serious problem could be quite this simple.

Every legislative alternative has occasioned some controversy and concern, especially in the region itself. Commencing in the 95th Congress and carrying through to the second session of this Congress, a variety of legislative approaches have been introduced and extensive hearings have been held. These hearings showed that acceptable legislation had to include: (1) strong conservation provisions; (2) provisions protecting the existing preference clause, and insurance that this legislation should not be considered as a precedent for other regions; (3) an effective regionwide public planning process; (4) a share in the economic benefits of the lower-cost Federal system for the residential customers of the non-preference customers; (5) higher rates for direct service customers; (6) fish and wildlife protection, mitigation, and enhancement measures; and

(7) assurances that the Northwest's legislative solution not impact detrimentally on other regions.

The hearings also demonstrated that a legislative solution to the region's electric power planning problems was imperative. The certain inability of the region otherwise to resolve its problems without legislation represents a serious economic, social, and environmental threat to the region and, by implication, to other regions of the country. The continued failure to use existing resources and conservation effectively and to plan efficiently for future needs raises the potential of severe regional electrical power shortages in this decade.

PURPOSE OF THE LEGISLATION

S. 885, as amended by the Committee, provides a mechanism through which the Pacific Northwest can resolve the differing claims over how the Federal resources are to be shared and begin coordinated planning to meet the electric power needs of the region. Emphasis is placed on conservation and the development of renewable resources. The Committee amendment establishes a public planning process to enable the States, localities, consumers, customers, fish and wildlife agencies and appropriate Indian tribes, users of the Columbia River System, and the public at large, to participate in the region's electric power decisionmaking process. It serves to protect and enhance the fish and wildlife of the Columbia River System. It fully preserves the preference clause and the long-held statutory rights of preference customers. It is not, however, intended to be a precedent for other regions, uniquely suitable for this region primarily because of the central role of BPA in the region's power system.

SUMMARY OF THE LEGISLATION

The Pacific Northwest Electric Power Planning and Conservation Act is intended to provide a legislative solution to the electric power planning problems of the Northwest.

It authorizes the Bonneville Power Administration to acquire additional resources on a long-term basis, giving first priority to conservation and renewable resources. The Act also requires the Administrator to sign new contracts for the sale of power to the region's utilities and direct service customers. In the absence of this authority, the Administrator would need to allocate the existing limited Federal resources among BPA's preference customers (public bodies and cooperatives) administratively (subject to judicial challenge), leaving these, other utilities, and the industrial customers in the region with the responsibility to meet their own uncertain future power needs.

To ensure that this authority to acquire purchase power is exercised in the region's best interest, a regional planning Council is established. This Council, made up of 11 voting members appointed by the Secretary of Energy upon the recommendation of the region's governors, is charged with establishing a Plan to guide the Administrator in the exercise of his authorities. In acquiring necessary resources to meet the projected power demands of the region, the Administrator must pursue conservation and end user renewable resources before proceeding to other resources. No major resources found to be inconsistent with the regionally developed Plan can be acquired without a lengthy process that ultimately requires approval by Congress.

Acquisition authority does not permit BPA construction or ownership, but permits the Administrator to purchase power developed by others for sale to the Administrator. To the extent that conservation measures cannot satisfy the region's needs, the Administrator is authorized, consistent with the plan, to enter into contracts with a sponsor of a generating resource to acquire the capacity of that resource. In this way, BPA is permitted to add to the regional power supply.

With this authority, the Administrator would be permitted to enter into contracts promising to meet the future

net requirements of his authorized customers and additional qualified customers. With such contracts, the preference customers could be assured of having all of their future needs satisfied and, pursuant to provisions of the Committee amendment, could maintain their existing preference to the supply and price of that power.

Direct service industrial customers now may purchase power, firm or near firm, directly from BPA. In 1978, BPA made direct sales of power to 13 DSIs located in Oregon, Washington, and Montana. Six of these operate 10 aluminum reduction plants, providing about 30 percent of U.S. domestic aluminum production capacity, while the other 9 are electroprocessing, pulp, paper, or chemical companies.

Following is a list provided by the General Accounting Office of DSIs receiving power from BPA, with their contract expiration dates and contract demand amounts:

| Customer | Contract expiration | Demand (million watts) (as of Mar. 1, 1979) |
|--|---------------------|--|
| Aluminum companies(6): | | |
| Alcoa | June 15, 1987 | 520 |
| Anaconda Co. | Sept. 8, 1987 | 379 |
| Intalco | Oct. 22, 1984 | 438 |
| Kaiser Aluminum & Chemical Corp. | Oct. 10, 1986 | 674 |
| Martin-Marieta Aluminum Corp. | Feb. 13, 1988 | 380 |
| Reynolds Metals Co. | Dec. 28, 1986 | 690 |
| Subtotal | | <u>3,081</u> |
| Other companies(9): | | |
| The Carborundum Co. | Dec. 31, 1985 | 30 |
| Crown Zellerbach Corp. | Aug. 30, 1983 | 14 |
| Georgia Pacific Corp. | July 6, 1984 | 27 |
| Hanna Nickel Smelting Co. | June 26, 1990 | 115 |
| Oregon Metallurgical Corp. | May 7, 1988 | 9 |
| Pacific Carbide & Alloys Co. | Sept. 9, 1991 | 8 |
| Pennwalt Corp. | Dec. 31, 1985 | 45 |
| Stauffer Chemical Works | Apr. 22, 1988 | 80 |
| Union Carbide Corp. | May 11, 1981 | 12 |
| Subtotal | | <u>340</u> |
| Total(15) | | <u>3,421</u> |

The GAO advises that BPA sales of power to these companies in 1978 were:

| | Kilowatt- hours (billions) | Dollars (millions) |
|--|----------------------------------|-----------------------|
| Six aluminum companies | 23.9 | 57.1 |
| Nine other companies | 2.1 | 5.5 |
| Sales to DSI's | 26.0 | 62.6 |
| Total BPA sales | 76.5 | 267.5 |
| DSI sales as percent of total BPA sales .. | 34 | 23 |

The Committee Amendment specifically authorizes the Administrator to enter into new contracts with these direct service industries. These contracts will provide power in amounts equal to, but not greater than, that which these companies are now entitled under existing contracts with BPA, and the terms of these contracts will require that these companies continue to supply reserves for the region.

These industries will also pay significantly higher rates under the new contracts. These higher rates permit the Administrator to enter into contracts with the region's investor-owned utilities for an exchange of power equal to the utilities' residential load. This exchange will permit residential customers of investor-owned utilities to share in the benefits of the lower-cost Federal resources. The power sold to BPA will be sold at the utilities' average system cost and purchased back at the rate paid by the preference customers' utilization their general requirements. The loss in revenue to the Administrator is in effect returned by the higher direct service industry rates. By providing these residential customers wholesale rate parity with residential customers of preference utilities, the amendment serves in a substantial way to cure a major part of the allocation problem.

The amendment also authorizes the Administrator to enter into contracts with investor-owned utilities to meet their future load growth. Although the rates for power sold under these contracts will be higher than is now being

paid by the preference customers for their general requirements, the offer of these contracts has benefits for these utilities' customers. It will integrate these utilities into an overall planning and delivery system which is appropriate to this region. By permitting a regional backup for the development of power necessary to meet this new obligation of the Administrator, the power will be produced at lesser cost. This will benefit all of the investor-owned utility customers. In addition, the lower cost power will result in lower average system costs, and thus lessen the cost of the exchange.

The amendment also ensures that regional planning and the management of the region's hydroelectric projects will pay due regard to the fish and wildlife resources of the Columbia River System, including anadromous fish. Protection, mitigation, and enhancement of this important resource is an integral element in this proposal.

LEGISLATIVE BACKGROUND

On August 17, 1978, former Congressman Lloyd Meeds introduced H.R. 13931, in an effort to provide a solution to the electric power planning problems identified within the region at the time. An identical bill, S. 3418, was introduced by Senator Henry M. Jackson. These bills represented a redraft of proposal first introduced in 1977. H.R. 13931 was cosponsored by eight Congressmen from the region and was jointly referred to the Committee on Interior and Insular Affairs and this Committee.

On September 19, 1978, the Committee's Subcommittee on Energy and Power initiated hearings on H.R. 13931. At that hearing, Subcommittee Chairman John D. Dingell said:

This bill is of vital concern of the consumers of the region. * * *, it raises a number of difficult issues, some of which reach far beyond the borders of the Columbia River Basin in their implications. These include: Impact on traditional Federal marketing pri-

orities, timetables for the implementation of vitally needed energy conservation programs, as well as the adequacy of those programs, the standards to be imposed upon the administrator of BPA, the adequacy of provisions for public participation, the costs of such a program to the Federal Treasury, the provisions for the acquisition of additional generating capacity and the purchase of power, the impact on the preference clause, antitrust questions, tax issues and more.

Additional hearings by the Subcommittee were held on September 27, 1978 in Washington, D.C. and on December 11, 13, and 14 in the States of Washington, Oregon, and Idaho. During these hearings, testimony was heard from over 100 witnesses including many of the region's elected officials, various Federal agencies, the General Accounting Office, State and local agencies, interested national groups, utility and industry representatives, fish and wildlife interests, environmental groups and the general public.

These hearings demonstrated that while a need for legislation clearly existed, the legislation needed considerable improvement.

At the commencement of the 96th Congress, H.R. 3508 was introduced by Congressman Al Ullman of Oregon, together with 11 other Members of the region's delegation. Similarly, Senator Jackson introduced S. 885 in the Senate. These bills contained the same provisions as H.R. 13931 and S. 3418. The sponsors of H.R. 3508 and S. 885 indicated, however, that introduction of this same bill was intended to trigger immediate legislative consideration and that there was a general consensus on a need for substantial modification.

On July 30, 1979, the Senate Committee on Energy and Natural Resources reported S. 885 with an amendment (S. Rept. 96-272) that substantially revised the bill. The

bill passed the Senate on July 30, 1979 after additional amendments were adopted.

Other bills introduced in the House during the 96th Congress are: H.R. 3508 by Mr. Ullman and 12 co-sponsors; H.R. 4137 and H.R. 4159 by Mr. Weaver; H.R. 5146 by Mr. Ullman; H.R. 5260 by Mr. Murphy of New York and H.R. 6677 by Mr. Swift.

Two additional days of hearings were held by the Subcommittee on July 30 and October 19, 1979. During the July 30 hearings, Congressman Tom Foley, on behalf of himself, Congressmen Ullman, Duncan, AuCoin, Pritchard, Baker, Dicks, Swift, Hansen and Symms, stressed the urgent need for legislation in this region. Congressman Foley briefly noted the four basic needs of the region:

The first of these is allocation. Half of the power in the Northwest is relatively low cost Federal power. All of that power is presently committed by contracts that begin expiring in 1981, and Bonneville lacks the authority to add significantly to supplies. Thus, allocation of Federal power cannot be avoided; the only issue is whether the reallocation will be legislated by Congress or performed administratively by the Administrator of BPA. An administrative allocation will be fought over for years in the courts because the amount of Federal power is sufficiently large and the cost is sufficiently low that none of the utilities or the industries serviced directly by BPA can afford not to take part in the impending courtroom battles. Without a legislative allocation of Federal power, disruption in the region is virtually inevitable.

The second need is power supplies. The Northwest has been growing rapidly, but even if our growth rate declined dramatically, the potential for large power deficits will remain during every year of the coming decade. The impact of such shortages on the Northwest will be particularly severe; no region is more dependent

on electric energy than ours. We cannot, by legislation, eliminate such shortages. What we can do, and must do, is give our region the tools it needs to reduce any impending power shortage through cooperative planning, development, and operation of our power resources and through stimulating electric energy conservation. We can and should do this under legislation that requires the Northwest to continue paying its own way.

Third is a regional power resource mix. In recent years, the Northwest has virtually exhausted its ability to obtain more firm energy from new hydroelectric units. We do not have significant oil and natural gas resources in the Pacific Northwest, and we do not use either gas or oil to generate any significant percentage of Northwest electricity. Within the Bonneville service territory, we have relatively little coal. Ten years ago, the region turned primarily to nuclear power to meet its load growth needs.

But nuclear power in the Northwest faces the same problems it does elsewhere in the country. For these reasons, there is increasing interest in broadening our generating resource mix to include renewable resources and there is widespread support for a strong conservation effort. We believe that every opportunity should be provided for renewable resources to compete with more conventional resources, and that conservation should be pursued vigorously. Without legislation, however, we have no regionwide mechanisms for enforcing or financing these efforts; we cannot capture their full potential under existing law.

Fourth are planning requirements. Today, power planning in the Northwest is largely in the hands of the utilities. The public, however, represented, should be more directly involved as well. Over the years, public and private utilities have worked in cooperation with Bonneville and its direct-service industries to

stretch regional energy resources and minimize the need for costly, new generating capacity. But, for a variety of reasons, few utilities possess the capacity to implement broad conservation programs and to develop renewable resources to their full, cost-effective potential. In addition, because of our heavy dependence on hydroelectric generation, energy decisionmaking also affects nonpower uses of our river system such as fisheries, farming, recreation, and navigation.

At the October 19 Subcommittee hearing, Congressman Al Swift summed up the dilemma still facing the Subcommittee:

* * * despite progress and improvement in this legislation since the last Congress, all the proposed bills, including S. 885, still appear to lack the kind of regional support necessary for passage. Specifically, the bills have been criticized as failing to protect adequately the broad range of interests which may be affected by passage.

Spokesmen for the region stress that the problems which prompted the legislation are no less serious today than they were last September when we began the first of 8 days of hearings on this subject. These problems include the need to allocate valuable electric power harnessed from the energies of the treasured Columbia River system; the need for strong conservation programs, and regional electric power planning, and the need to enhance the region's diminishing anadromous fish resources.

On March 3, 1980, Congressman Swift introduced H.R. 6677, which substantially met many of the concerns expressed by witnesses at the Subcommittee hearings and by many Members of the Committee. The bill, while generally following the format of S. 885, substantially revised the Senate-passed bill and eliminated many ambiguities identified in that bill, particularly by the region's preference

customers, the DSI's private utilities, governmental entities, Indian representatives, fishery representatives, environmentalists, and many concerned individuals in the region. It was the basic markup bill in the Subcommittee and the Committee, representing a vast improvement over other bills considered by the Committee.

COMMITTEE ACTION

The Committee on Interstate and Foreign Commerce met on March 19, 1980 to consider the text of H.R. 6677 as an amendment to S. 885 and ordered S. 885, with an amendment, reported to the House by a voice vote, a quorum being present.

The Committee wishes particularly to commend Congressman Swift and all the Members of the region who have been immeasurably helpful to the Committee in understanding the problems of the region. These Members have worked with the various entities and citizens of the region to develop an improved bill aimed at meeting the concerns of region and the nonregional interests.

The Committee also expresses its appreciation to the Administrator of the BPA, Mr. S. Sterling Munro, and his staff for the technical assistance BPA provided to the Committee.

The Committee is also appreciative of the assistance received from the General Accounting Office. The GAO's report of September 4, 1979, entitled "Impacts and Implications of the Pacific Northwest Power Bill", was extremely helpful to the Committee.

GENERAL EXPLANATION

The basic framework of the Committee amendment to S. 885 corresponds to the structure of all of the introduced bills addressing the electric power planning problems faced by the Pacific Northwest. These basic features are: (1) a grant of expanded authority to the Bonneville Power Administrator to purchase additional power on a long-term

basis; (2) the establishment of a public planning process charged with preparing a plan to guide the Administrator; (3) the establishment of effective provisions concerning fish and wildlife of the Columbia River and its tributaries; (4) a requirement that conservation and renewables have a priority for acquisition by the Administrator; (5) an obligation on the Administrator to offer new long-term contracts for the sale of power to preference customers, Federal agencies, investor-owned utilities, and existing direct service industries; (6) a revised schedule of rates; and (7) a power exchange designed to benefit the region's residential customers; and (8) preservation of the preference clause. A number of concerns are raised by the provisions detailing these basic components and the following discussion highlights those issues and how they were addressed by the Committee.

a. Protection of the preference clause

Preference means the statutory priority to purchase Federally-generated electricity which has, generally been provided to public bodies and rural electric cooperatives in over 32 Federal power marketing laws. These preference provisions date back to 1902 and were enacted to insure that Federal hydroelectric generating facilities would be operated for the benefit of the general public. As noted earlier in this report, the principal preference clause applicable to the Pacific Northwest is included in the Bonneville Project Act. Although similar to other statutes, this Act also contains additional language indicating that the "general public", especially domestic and rural customers, should benefit from the sale of Federal power.

Concerns have been expressed that S. 885 might be construed to change the meaning or application of preference in the Northwest, and by precedent, nationally. However, the intention of this Committee is clear. The Committee does not want to undo nearly 80 years of history or establish any precedent. Specific provisions incorporated in the Committee amendment are designed to protect the

entitlement of both existing and new preference customers to the full Federal base system. These provisions seek to protect preference as to both supply and price.

One of the basic provisions of the Committee amendment is section 5(a). It states:

SECTION 5. (a) All power sales under this Act shall be subject at all times to the preference and priority provisions of the Bonneville Project Act of 1937 (16 U.S.C. 832 and following) and, in particular, sections 4 and 5 thereof. Such sales shall be at rates established pursuant to section 7.

The purpose of this provision is clear. The Committee wants to insure that all preference customer contract requirements will continue to have a priority over sale to other customers and other sales would be, in effect, subordinate to preference provisions of the Bonneville Project Act, including the five-year withdrawal features for contracts with nonpreference customers and the 20-year limitation on the terms of the contract.

Section 5(b)(6) also assures preference customers' right to purchase power from the equivalent Federal base system before BPA can restrict its obligation to deliver power to those customers.

In addition, section 7(b) reserves for preference customers the price benefits of Federal power that they would have enjoyed in the absence of this legislation. This is accomplished by a "rate ceiling" which governs preference customer general requirements rates. Under this provision, the Northwest preference customers could pay less — but not more — for power under the legislation than they would have in any 5-year period.

The "rate ceiling" is essentially that preference customers' cost of power from BPA will not exceed the costs they would have paid for power if:

(1) preference customers were served from available Federal base system resources and, after these

were exhausted, from such customers' own new resources;

(2) preference customers served direct-service industrial customers located in or adjacent to their geographic service boundaries; and

(3) no IOU exchanges for residential customers were made.

Lastly, section 10(c) of the bill contains a disclaimer which flatly states that the bill does not "alter, diminish, abridge, or otherwise affect", either directly or indirectly, the preference provisions of other Federal laws. The Committee clearly intends no such construction of this Act by a court, Federal agency, or others that could affect in any way such provisions of law.

The Committee believes that these and other safeguards adequately protect the preference clause and the long-held rights of preference customers in the Pacific Northwest and elsewhere.

b. BPA financing and Federal guarantees

The Bonneville Power Administration is self-financed. Pursuant to the Federal Columbia River Transmission Act, BPA must meet all its costs, including the cost of the Federal investment in the Columbia River system, from its power sale revenues. General tax revenues are not used to support BPA programs. The Committee amendment continues this financial independence while maintaining the current practice of Congressional review of BPA activities as part of the normal budget review process.

However, issues were raised concerning Federal backup or "guarantee" of the Administrator's acquisition of resources. Although section (6)(i) makes clear that Federal monies could not be used to support acquisitions or other activities, BPA would remain a Federal agency and it was argued by some that a Federal backup might be provided

when the Administrator assumes an obligation to pay project expenses including debt obligations issued in connection with an acquired resource. The Department of Treasury was asked to address this concern and to make recommendations for necessary changes. Treasury defined as a possible guarantee the use of BPA bond authority in connection with many resource acquisitions. Assistant Secretary of Treasury Roger Altman, in September 25, 1979 testimony before the House Committee on Interior and Insular Affairs, was principally concerned with what he saw in S. 885, as it passed the Senate, as a "granting of tax-exempt interest coupled with the backup of a Federal agency's . . . credit".

To meet this problem, Secretary Altman recommended that section 8 of S. 885 be amended to only "extend the borrowing authority for financing conservation programs and small, renewable resource projects".

Section 8(c)(1) of the Committee amendment generally carries out the Secretary's recommendation in its amendment to section 13(a) of the Federal Columbia River Transmission System Act. The amendment permits use of BPA's authority to issue bonds to be extended to this legislation, but precludes such use in acquiring under section 6 of the Committee amendment "electric power from a generating facility having a planned capability greater than 50 average megawatts".

Lastly, in order to make clear that all contracts and other obligations required of the Administrator will be secured solely by BPA revenues and not by the Federal government, the Committee included section 6(j)(2) which requires that, in the sale of any obligation, all offerings and promotional material shall contain language indicating that such obligations are "not intended to be, nor are they, secured by the full faith and credit of the United States".

c. Removal of BPA restriction on acquisition or purchase of power to meet needs

One of the most controversial issues surrounding this legislation has been the concern that the grant of authority to BPA to "purchase" power as a supplement to its hydro base was too broad. A number of witnesses at the Energy and Power Subcommittee hearings voiced their concern that this authority would be misused, would make the BPA Administrator a "Czar", that BPA would undertake an expansive and expensive construction program in competition with public and private utilities, and that BPA would become a nuclear power agency. The Committee amendment addresses all of these charges and concerns.

The BPA Administrator lacks adequate authority under existing law to purchase additional power on a long-term basis. The net billing scheme discussed earlier in this report represented an attempt to provide this additional authority, but it is no longer an adequate means for resource acquisition.

BPA and others believe new authority for resource acquisition is an essential piece of this legislative solution. Without such authority, BPA asserts that the amount of power available to BPA is fixed. BPA, in a May 20, 1979 document outlining issues relative to this legislation, said:

Under the preference clause, this fixed quantity of BPA power must eventually be offered solely to the public bodies and cooperatives, since the projected needs of these preference customers will in future years exceed the total BPA supply. Given its limited power supply, BPA cannot execute new firm power sales contracts with nonpreference customers such as investor-owned utilities (IOU's) and direct service industries (DSI's) as proposed in the legislation. These facts have set the stage for an imminent and protracted legal battle within the Northwest over the meaning and application of the preference clause, the formation of

new preference utilities or other entities claiming preference status, and the fate of the DSI's and the vital power reserves that BPA's contracts with the DSI's provide for the region.

This regional legal battle can be laid to rest if (1) the DSI's are able to trade in their existing low-cost power contracts for new contracts at higher rates; (2) the low-cost power released by the DSI's can be made available to residential and small farm customers of regional IOU's; and (3) the preference rights of publicly-owned and cooperative utility systems can be preserved. Such an allocation system is the heart of the proposed regional power legislation. It would permit the Northwest to put aside its battles over low-cost power and to work cooperatively again in planning to meet the region's future needs for conservation and renewable resources, as well as conventional resources, as part of an efficient, economical, and environmentally sound regional power system.

The proposed allocation system can be carried out only through new contracts between BPA on the one hand and preference customers, IOU's and DSI's on the other. But under present law, BPA cannot execute such contracts. The fixed supply of BPA power is too small to meet even the full future requirements of preference customers in the future, and therefore contracts with the nonpreference IOU's and DSI's are legally precluded. This is true even though the total supply of Federal plus non-Federal power in the region is, and can remain, sufficient to meet the region's total loads. BPA simply cannot obtain the non-Federal power under present law.

The Committee amendments seek to address the allocation issue by directing in section 5(g) that BPA commence, within nine months after enactment, negotiations and offer

initial long-term, not to exceed 20 years, contracts to each of the following types of customers:

- (A) existing public body and cooperative customers and investor-owned utility customers;
- (B) Federal agency customers;
- (C) electric utility customers; and
- (D) direct service industrial customers.

Crucial to the legal authority to enter into these contracts is section 5(g)(7) which provides that BPA "shall be deemed to have sufficient resources" for the purposes of entering into such initial contracts. In order to fulfill its statutory commitments, the BPA must have adequate authority to acquire resources on a short-term and long-term basis.

As recognized in the Committee amendment, section 3(12) and section 6(a)(3), BPA now has authority in accordance with section 11(b)(6) of the Federal Columbia River Transmission System Act to use funds from the BPA fund to purchase electric power for periods of five years or less to meet its commitments. The Committee amendment does not alter that authority.

For the long term, section 6 authorizes the BPA to acquire "resources" to meet these contractual obligations. However, in providing this authority, the Committee was mindful of the concerns by some that this authority not provide a "blank check" to BPA to acquire whatever resources it deems appropriate. The Committee limited that authority and set priorities. For example, the Committee amendment defines the term "acquire" and "acquisition" in section 3(1) to make clear that BPA is not authorized to construct or "have ownership of" any "electric generating facility". Further, the Committee amendment provides that BPA must first "take into account planned savings from conservation and conservation measures". In addition, all acquisitions, except where specifically provided, must be

consistent with the Regional Electric Power and Conservation Plan which the regional planning Council will adopt. If no plan is adopted, the criteria and considerations of section 4(e) will apply. As an added safeguard, the Council established by this bill is empowered to review many of the acquisitions. A demonstrated need for the resource will be required. In the case of "major resources" which have a planned capability of greater than 50 average megawatts, the BPA must go through a lengthy procedure, including hearings.

The Committee believes that this purchase authority is needed. However, the Committee also believes that the above provisions, as well as others, should meet the concerns expressed by the Committee and others. Most importantly, it is the Committee's intention to conduct periodic oversight over the BPA's use of this authority.

d. Capability versus output — dry hole

BPA has no authority to own or construct power resources and the proposed legislation does not grant that authority; it does, however, permit BPA to purchase the output or capacity of power resources that are owned or constructed by other entities. The priority for resources eligible for such purchase are specified in the legislation as, first, conservation, second, renewable resources and, finally (as the least-preferred alternative), conventional thermal resources.

Concern has been expressed that authorizing BPA to purchase capacity — as distinct from mere output — will be harmful to the region's ratepayers, and that it will lead to overbuilding of conventional power resources in the Pacific Northwest and unnecessary cost overruns.

An entity (such as BPA) purchasing power from the owner of a power resource (such as a utility) may do so in two basic ways. First, if the resource is already in existence and a certain amount of power appears to be surplus to the needs of the owner for some period of time, the purchasing

entity may simply buy that amount of power from the resource on the utility system. This type of purchase is most common in cases of temporary surpluses and deficits among interconnected power suppliers, and generally involves only short-term purchases and sales.

A second type of purchase arrangement is generally used when the power resource in question is not yet constructed. The owner planning to build such a resource may offer to sell an ownership share in the project or, alternatively, a share of the resource's planned capability. In either event, the purchaser is obligated to pay its percentage share of the project's construction and operating costs and is allowed to exercise ownership operating rights for its share, just as if the purchaser were a part owner. This type of arrangement was extensively used in developing the non-Federal mid-Columbia hydro facilities and is now used generally throughout the United States. The legislation would permit BPA to enter into this type of arrangement.

Since the purchase of resource capability carries with it the risks of unexpected cost overruns and operating problems (including the risk of a so-called "dry hole"), it might appear that capability purchases are imprudent, even if traditional. The reasons that support creation of purchase agreements are as follows:

- (1) The risk of cost overruns and operating problems are inherent in constructing any power resource (including conservation investment programs such as regionwide home insulation). These risks are ordinarily borne by ratepayers that will obtain the benefits. An individual utility owner of a power resource will not agree to an arrangement that leaves all the risks on the shoulders of its own ratepayers yet shares the benefits (the power produced at cost) with the ratepayers of the purchasing entity.

- (2) The long-term purchaser is really equivalent to a part owner of the resource, since the purchaser will receive the right to a certain percentage of the power for the life of the

resource and will pay only the actual costs of the resource. It is fair that the purchaser assume its percentage share of the risks.

(3) In many cases, the resource is being built or undertaken by a group of utilities primarily to satisfy the regional power needs. If BPA did not agree to purchase capability as its share of the project, the project would simply be undertaken by a group of utilities on their own, with each utility meeting its own load growth requirements through its own projects and with no help to BPA. Such action would in turn decrease the integration and efficiency of the regional power system and would probably lead to overbuilding of power resources, with added costs to consumers. There would be no regional program under these circumstances.

(4) Purchase of capability reduces costs to consumers by reducing financing costs of the new resource, whether that bond-financed resource is conservation or a generating facility. Financing costs — a very substantial portion of total power costs — are reduced because bond buyers are willing to accept lower interest rates on lower-risk bonds, the wider the risks can be spread, the more secure the bonds. As discussed in (3) above, without purchase of capability the utilities must look to themselves to absorb the risk and would consequently lose access to over half the region's power supply over which they could otherwise spread the risk.

(5) Purchase of capability, by placing the purchaser in a quasi-ownership status, also permits the purchaser to exercise effective oversight on resource management, construction and operation. A mere purchase of power would have no such opportunity. Yet the cost of power to the purchaser is based in both cases on the actual construction and operating costs of the power resource. The Committee amendment strengthens the BPA in this regard and requires BPA to oversee such construction and operation.

If the bill limited BPA purchase of resources to actual output only, BPA, in order to have available power to sell, would have to find utilities who would be willing to develop new resources at risk to their customers and, at the same time, also be willing to provide to BPA the benefits of an operating plant. The testimony shows that no utility would prudently agree to such an arrangement. One may contend that such testimony is self-serving and that if Congress authorized acquisition of actual output only, the utilities would, in fact, enter into such agreements because of the advantages of hooking up to the BPA system. The Committee recognizes this possibility, but believes it is too speculative and is inconsistent with longstanding utility practice. The General Accounting Office confirmed that this practice exists in a September 4, 1979 response to questions posed by Subcommittee Chairman Dingell. The GAO said:

Our review indicated that it is common practice for electric utilities purchasing the output of major thermal plants to agree to repay construction bonds whether the plant operates or not. Generally, plant output is not guaranteed by any one entity because the risks of cost overruns and operating problems — particularly on nuclear power plants — are too great to be safely assumed by a single owner or builder. It is therefore natural for several utilities to share the risk of a "dry hole".¹ By doing so they can limit their respective risks and collectively provide a large enough revenue base to withstand a major loss.

With respect to the reasonableness of BPA's purchasing the capability of WPPSS nuclear plants, two other questions emerge. The first question is whether BPA should limit its customers' exposure to financial risks by committing them to large thermal power plants more cautiously or with more diversity. BPA's present commitments include 100 percent of the output of two WPPSS plants, WNP-1, and WNP-2, and 70 percent of a third plant, WNP-3. The aggressiveness of BPA's

commitment has its drawbacks. There is virtually no sharing of the considerable financial risks with other utilities — BPA has not taken on sufficient partners in construction. In this respect, we noted that the region's investor-owned utilities have never committed themselves to as much as 70 percent of a regional nuclear plant. Of the five nuclear plants constructed or planned for construction by investor-owned utilities, the average participation for each utility is about 30 percent of any one plant. [Footnote omitted.]

The Committee shares the GAO concern about the "aggressiveness of BPA's commitment". Sharing of financial risks among several entities is prudent and should certainly be given careful consideration by BPA and the council in administering this program. The Committee did not want to limit BPA's exposure because this might not have proved wise, particularly in light of concerns discussed later in this report about exempting utilities from the requirements of the Public Utility Holding Company Act. However, the Committee strongly believes that the BPA should act conservatively in entering into these commitments and expects that all such proposals will be fully justified and carefully scrutinized in the review process for acquiring resources set forth in the Committee amendment.

e. Public Utility Holding Company Act of 1935

One controversial provision concerning this legislation has been the proposal to exempt from the provisions of the Public Utility Holding Company Act of 1937 persons and companies in the Northwest that are organized for the primary purpose of financing, constructing, and managing electric generation facilities wherein 75 percent or more of the power is, or will be, sold to BPA. Mr. Robert Short, President of Portland General Electric Co., testified that the "reason for creating generating subsidiaries is to reduce the financing cost of building plants". He said:

The purpose of section 9(b) is to allow the eight investor owned utilities in the Pacific Northwest to

create jointly owned corporations to finance, construct, and operate plants to sell power to BPA under this bill. The reason for creating generating subsidiaries is to reduce the financing cost of plants.

A generating subsidiary would not be subject to most utility indentures restrictions and could have a higher debt ratio. BPA's contract to purchase the output of the plant will strengthen the generating subsidiary's credit rating, thereby allowing a higher debt ratio; thus, lower interest rates.

The Public Utility Holding Company Act exemption is needed because, as the SEC pointed out in its September 25, 1978, letter to Chairman Dingell, formation of a generating subsidiary would cause us to be deemed "holding companies" under the Public Utility Holding Company Act. The Holding Company Act puts us to a choice — either accept holding company status or stay out of a generating subsidiary. Holding company status could require several of the Pacific Northwest utilities to divest themselves of nonelectric utilities and one of them to divest itself of the part of its electric system not in contiguous states, as well as raise questions about the status of non-utility properties. The cost of holding company status would be too high, so that the benefits of the generating subsidiaries would be foregone.

Exemption from the Public Utility Holding Company Act is not an escape from regulation. Every private utility is subject to complete regulation — either by states, the FERC, or in most cases, both. A generating subsidiary would be subject to the same system of regulation.

However, Mr. Alex Radin, Executive Director of the American Public Power Association, objected to a "blanket exemption" by legislation. He said:

We have been informed by the SEC that no similar statutory exemption has even been granted, and we

do not believe that such a legislative exemption is necessary or desirable in this instance. It should be noted that procedures are contained in the Public Utility Holding Company Act itself for exempting companies from the Act's requirements. It is therefore possible that exemptions, if necessary, could be secured through available administrative procedures. The administrative exemption route would permit the SEC to review the types of actions to be undertaken. This review would be preferable to the unreviewable exemption to be conferred by the legislation.

The Federal Trade Commission and many members of this Committee also doubted that a legislative exemption was necessary or desirable. Chairman Dingell and Congressman Gore particularly noted that the SEC has been somewhat lax in its enforcement of the Act, but doubted that was sufficient reason for eliminating SEC's role entirely. The FTC, in a July 26, 1979 letter to Congressman Weaver said:

I disagree that a legislative exemption is more suitable than an administrative one. In section 3(d) Congress has conferred broad rulemaking authority upon the SEC, which has developed more than 40 years of expertise in administering the Act. More important, the SEC could revoke an administrative exemption if the conduct of the companies involved so warranted, where as a legislative exemption could not be altered by further Congressional action. I believe that competition and consumer protection would be better served under an administrative exemption—and the SEC's continuous monitoring which such an exemption would entail—than by a legislative one.

However, the SEC, which administers the Act, disagreed and supported the legislative exemption act. Indeed, the SEC, in a January 14, 1980 letter to the Subcommittee, said:

* * * it does not appear that there is any substantial need to subject the sponsoring parent companies of the

proposed generating company to regulation under the Act. All of these companies, and the proposed generation company will qualify for exemption only as long as it serves the purposes of the bill. The impact of regulation under the Act would relate to matters having little to do with the purpose for which the generation company is to be organized.

The SEC also expressed reservations about certain proposed monitoring responsibilities delegated to the Commission.

The Committee was convinced that leaving the matter to a subsequent administrative determination under existing law, particularly if Congress rejected a statutory exemption, would not be sound. Similarly, the Committee did not believe it sound to establish a legislative exemption subject only to approval by the BPA, which has no expertise under the Act. Also, the Committee did not share the SEC's view that monitoring was unnecessary. Thus, the Committee amendment authorizes an exemption where both the BPA and the SEC concur that the organization of the new company is consistent with the policies of the 1937 Act. The exemption is not automatic.

The Committee also required that at least 90 percent of the electricity generated by such company be sold to the Administrator. Despite the SEC view that administrative difficulties exist with respect to a percentage limit, the Committee included this provision in order to narrow opportunities for abuse.

In addition, the company must show the BPA and the SEC that participation in the company's facilities must be offered to the region's public bodies and cooperatives. Also, BPA must include in contracts with such companies provisions limiting the equity investment in such company. BPA, with the SEC's concurrence, must approve certain contracts between the company and any sponsor company or subsidiary.

Most importantly, the Committee requires that the SEC and BPA monitor the exempted company. If either SEC or BPA determines that it is not operating in a manner consistent with the 1937 Act, a preliminary determination will be issued and made public. A hearing will then be held if the consistent conduct is not remedied and a final determination will be issued.

The Committee expects both agencies, particularly the SEC, to act prudently and with vigilance in administering this first exemption from the 1937 Act. This provision is not to be considered a precedent for future exemptions.

f. Tax-exempt financing by public bodies

Under existing law, State and local governmental units are permitted to finance generating projects by issuing bonds, the income from which is exempt from Federal taxation. The legislation does not change the existing tax exempt status of those governmental units that are also public utilities.

Under this bill the region's publicly-owned utilities will finance powerplants, to meet their projected load growth through sales to BPA. Although BPA will be merely reselling this power back to these same utilities, the Committee recognized that the sale to Bonneville would be a sale to a non-exempt person, thus jeopardizing the use by these public utilities of their existing privilege of tax-exempt financing. Although the sale of power from these resources to BPA should not destroy this authority, it was also the clear intent of the Committee not to expand the authority. In this respect, there was concern that section 9(e) of the Senate-passed bill would allow those generating units to provide substantial amounts of generation for sale to BPA to meet load growth of investor-owned utilities. In order to avoid this possibility, the Committee specifically amended this section to limit BPA's purchases from State and local governmental units to that amount of power which is needed to meet the load growth of public bodies, co-

operatives and Federal agencies at a cost no greater than the cost which would be applicable without the acquisition. To assure that there is no abuse, the Administrator must certify, in accordance with a procedure and methodology approved by the Secretary of the Treasury, that BPA is acquiring resources for these entities solely. However, an exception is permitted where BPA also certifies that it is not able to acquire the resources without selling a portion to non-exempt persons, as defined in the IRS Code. In addition, the Secretary of Treasury must determine that less than a major portion is to be furnished to persons who are not tax exempt under regulations applicable to industrial development bonds.

The resource can be planned and used to meet the load growth of cooperatives at Federal agencies, as well as public bodies, even though cooperatives and Federal agencies are not exempt bodies under Internal Revenue Service regulations. However, in making the determination under such regulations that less than a major portion of the resource is to be furnished to non-exempt persons, the Secretary will treat Federal agencies and cooperatives as non-exempt.

With these provisions, the existing authority to issue tax-free bonds is preserved but not expanded.

g. The bill's impact on other regions

Concerns have been expressed that the legislation may have the effect of providing incentives for new commerce and industry to move to the Pacific Northwest at the expense of other regions, or that the bill may afford Northwest utilities special financing advantages over other parts of the country. In addition, some fear the bill's effect on the Pacific Northwest's ability to supply surplus energy to other regions.

Electric power rates in the Northwest are and have been among the lowest in the Nation, though this fact has not

resulted in disproportionate amounts of industrial and commercial activity in the Northwest.

Under this bill, rates for increased loads resulting from any new commercial and industrial activity ("New Single Large Loads", section 3(12)) are excluded from the Federal base resource rate. Thus, any utility seeking additional power to serve such a load would be charged a rate equivalent to the new resource cost. This new resource cost should be the same or higher than the cost to utilities in other regions to serve such load. This provision should help to narrow, rather than expand, the Northwest's advantage in attracting new industry through lower-cost electricity. (Industry and commerce served by IOU's do not and would not, under the bill, have access to the low-cost Federal base system.)

It will remain possible, however, for a public utility to subsidize industry with lower-cost residential power. This would, of course, need the consent of the utility's governing body.

The bill would create a more secure marketing arrangement by virtue of the BPA purchase authority since it would have the effect of putting all BPA's customers behind certain State and local obligations. This would create a lower-risk security, bearing a lower return on capital. This has raised the question of whether Northwest security issues could adversely impact security issues of utilities in other regions where comparable marketing schemes do not exist.

The Subcommittee on Energy and Power explored this issue and the evidence heard indicated that financing under this bill should not jeopardize financing of projects in other regions and that insofar as the conservation provisions decrease the development of generating resources, this will mean less competition in capital markets. As is the existing practice, bond sellers will continue carefully watching the issuance of debt obligations from other borrowers, including

the Pacific Northwest, so as to minimize competition but there was no evidence presented to the Committee that this legislation will detrimentally impact other borrowers.

The Northwest is now interconnected to other Western regions, particularly the Pacific Southwest. Mutually-advantageous regional exchanges and sales of surplus hydro energy from the Northwest to the Southwest have been effected over the intertie to the Southwest. The Northwest's seasonal surplus occurs at the same time as the Southwest's seasonal peak and the Northwest's winter peak also comes at a time of seasonal surplus for the Southwest utilities. As a result, over the past 11 years, an estimated 67.5 billion Kwh of surplus energy have been sold to Southwest utilities, displacing oil consumption of 230 million barrels of oil or its equivalent.

To the extent that the Committee amendment would resolve the impending BPA administrative allocation and the incident uncertainty in power planning, the region is more likely to have the resources to support mutually advantageous exchanges with other regions and, in years of high river flows, seasonal surpluses to sell.

In summary, the Committee was careful to ensure that this bill would not detrimentally impact other regions and that any impact would, in fact, be beneficial.

h. Fish and wildlife

The Pacific Northwest has the distinction of being an area with an abundance of fish and wildlife resources that has provided food and recreation for many each year. The Puget Sound, for example, is a principal wintering area for waterfowl from British Columbia, the Northwest territories, Alaska, and Eastern Russia. Similarly, many areas of the Columbia River and tributaries provide nesting and resting areas for waterfowl and other migratory birds of the Pacific Flyway. However, many of these areas have been adversely affected by dams.

Probably the most important water-related resource of the region is the anadromous salmon and steelhead resources of the Columbia Basin. The once plentiful anadromous fish runs in the Columbia River Basin have been badly depleted. Several of these fishery species are being studied for listing as threatened and endangered species. About two-thirds of the area where salmon and steelhead originally spawned have been rendered inaccessible to the fish by the construction of dams. The GAO described the impact of these dams on anadromous fish in its September 4, 1979 report to Subcommittee Chairman Dingell as follows (pp. IV.3-IV.5):

Until the completion of the Grand Coulee Dam on the Mid-Columbia River in 1941, adult salmon and steelhead enjoyed fairly unimpaired access to most of their historic spawning areas. Chinook salmon once traveled nearly 1,200 miles up the Columbia River to spawn in tributaries of its headwaters in Canada. Because of its great height, Grand Coulee Dam was not provided with fishways, and its completion ended access by anadromous fish to more than 500 miles of the upper river and many hundred miles of productive spawning and river tributaries. During the next three decades more dams were constructed along the main-stem of the Columbia River and its major tributary, the Snake River. Chief Joseph Dam, constructed and operated by the Corps of Engineers, and Hells Canyon Dam, operated by the Idaho Power Company, mark the upstream limits of anadromous fish migration on the Columbia and Snake Rivers, respectively, since neither was provided with fish ladders.

Adult salmon and steelhead ranging from 5 to 50 pounds must negotiate 9 dams to reach the upstream limit of their migration on the Columbia River. Adult fish journeying to the natural spawning areas in the Snake River and its major tributary, the Salmon River, must pass over eight dams—four on the Columbia and four on the Snake. Of the 16 main-stem dams impacting

on the anadromous fish, 9 are operated by the Corps of Engineers, 1 by the Bureau of Reclamation, and 6 by electric utilities in Washington and Idaho.

The dams also pose serious problems for young salmon and steelhead migrating downstream to the sea. Prior to the expanded development of the river's main-stem, large quantities of water in excess of power needs were allowed to flow over the spillways. This spillage aided the downstream move of smolts, but resulted in nitrogen supersaturation which cause a high mortality rate. This problem was reduced by the development of spillway deflectors, increases in upstream storage capacity, and installation of additional turbines.

In recent years, completion of more main-stem projects and the installation of additional turbines for peaking purposes have enabled power managers to put most of the river flow through their powerhouse turbines. While this reduced spillage and nitrogen supersaturation, it created a serious new problem—turbine mortality among migrating juvenile salmon and steelhead. During the period of April to June when the juveniles are migrating downstream, great numbers of them are killed by or as a result of passage through the hydropower turbines.

Smolts surviving passage through the turbines of one dam enter the large, slow-moving reservoir of water formed by the next dam. The river no longer has the strong, swift current needed to carry the smolts rapidly downstream and out to sea. It now takes young fish more than twice as long to migrate downstream as it did before the dams were built. The slower the downstream migration, the more smolts are lost to predators. Others lose the desire to migrate and become permanent residents of the river, further reducing the breeding stock that finally reaches the ocean. It is the cumulative effect of hydro facilities which is so destruc-

tive. Each facility poses a separate and sometimes different set of problems for migrating smolts, and each contributes to a cumulative deterioration of the downstream migration. Depending on flows, juvenile losses from all causes average an estimated 15 to 20 percent at each main-stem dam and reservoir complex. Mortalities as high as 30 percent per project have been recorded under particularly adverse conditions.

These problems occur in normal or good water years. In low or below normal water years, the problems are compounded and mortality rates for downstream migrants increase. Juvenile losses increase because of competition for available water supplies. River waste is released from upstream reservoirs when needed to best serve flood control, power production, and irrigation purposes. This may or may not provide enough water at the right time to aid the downstream migration of young salmon and steelhead.

Many of the witnesses at the Subcommittee's regional hearings complained that fish and wildlife resources and their protectors are ignored or treated with disdain by the power interests of the region. Fish and wildlife migration and enhancement is not mentioned as an authorized purpose of the Federal dams. The fish and wildlife have no vested rights. Fish hatcheries to compensate for fish losses have been built, but this has not been enough. Efforts to maintain flows for anadromous fish runs have often reportedly met resistance. The GAO points out that the BPA, for example, recognizes "the cost of revenue lost as a result of special operations, including water spillage, at Federal dams to facilitate downstream movement of juvenile salmon and steelhead during the spring".

One critic of the Pacific Northwest's power interests testified that he feels that these interests take the view that all unappropriated water in the main-stem Columbia and lower Snake Rivers should be used to maximize power production and revenues. He is Mr. Ed Chaney of the

Northwest Resource Information Center, Inc., in Idaho. Mr. Chaney said:

During the years of low and average runoff, virtually the entire flow of the main-stem Columbia and to a somewhat lesser extent the lower Snake River is put through the turbines of successive main-stem dams. Salmon and steelhead migrating to the sea from the upper Columbia Basin necessarily go with the flow. During the low flow year of 1973, an estimated 95 percent of all salmon and steelhead produced in the upper Columbia Basin were killed by main-stem dams and reservoirs before reaching the estuary below Bonneville Dam.

This catastrophic loss prompted basin State and Federal fishery agencies to ask the Federal agencies (BPA, Corps, and Reclamation) and the Washington County public utility districts to annually manipulate main-stem flows during the peak of juvenile downstream migration to minimize mortalities. This request was met with what can only be politely termed a decided lack of enthusiasm.

Record low flows associated with the 1977 drought threatened to annihilate upriver salmon and steelhead runs already in serious trouble from years of chronic uncompensated losses at Federal and PUD hydrodams. In spite of this threat, Federal and PUD hydropower interest refused to divert any of the public's unappropriated water from hydropower production to prevent the destruction of the upriver runs.

The PUD's were subsequently ordered to do so by the Federal Energy Regulatory Commission. The Corps of Engineers, BPA, and Reclamation were "persuaded" to do so by the unanimous formal urging of Oregon, Washington, Idaho, and Montana Governors and the personal intervention of the U.S. Secretary of the Interior.

No effort was spared to limit the amount of water diverted from hydropower production to protect the fish. The net amount finally diverted from hydrogenation was about 0.0016 of the annual unappropriated flow of the Columbia River at Bonneville Dam.

Mr. John R. Donaldson, Chairman of the Columbia River Fisheries Council, also was critical of the impacts of dams on the fisheries. He said:

Rivers have altered the seasonal distribution of flow, greatly reducing flow in the spring and increasing it in the winter. A moderate adjustment of the seasonal flow pattern to restore some of the spring freshet is needed. The existing practice of regulating flow of the Columbia River to maximize power revenues, including the export of surplus Northwest power to the Southwest, is the most critical factor causing a severe decline in upriver salmon and steelhead runs above Bonneville dam.

The GAO, in its September 4, 1979 report, responding to the Subcommittee's concern that no single agency appears to be adequately addressing the fish and wildlife problems, said:

No single agency — Federal or otherwise — has been assigned oversight responsibility and authority for maintaining the anadromous fish runs on the Columbia River System. A number of Federal and State agencies and Indian organizations, as well as several interagency coordinating bodies, impact on salmon and steelhead fisheries. The interests represented by these entities are sport and commercial fishing, Indian treaty fishing, agriculture, interstate navigation, flood control, and power production. Responsibility for the protection of salmon and steelhead runs is fragmented and the resources is subject to management by committee.

Fishery maintenance and enhancement is not specified as an authorized purpose of the dams, and the fish runs have no vested water rights. Consequently, fishery management agencies must seek the voluntary cooperation of the operating agencies and utilities of petition the Federal Energy Regulatory Commission (FERC) to provide spills and flows at non-Federal dams that will allow for successful migration of juvenile fish. In March 1979, officials from Federal and State fisheries agencies, Indian tribes, and three electric utilities negotiated until the "eleventh hour" — just before a FERC hearing — before agreeing to the quantity of water to be spilled at utility dams in order to accommodate the spring migration of juvenile salmon.

Existing Federal legislation is not adequate to offset the cumulative impact of the hydroelectric dams of the Columbia and its tributaries on fish and wildlife. To remedy this situation, Mr. Terry Holubetz of the Columbia River Fisheries Council made five recommendations. He said:

Mr. Chairman, the Columbia River Fisheries Council strongly recommends that the following points be incorporated in the Pacific Northwest Power bill: (1) Fisheries must be identified as a major subject area, thereby providing status for fisheries equal to energy; (2) A formal procedure that provided the annual opportunity to the appropriate fisheries agencies and Indian tribes to jointly submit recommendations to the planning Council regarding management measures needed for preservation and enhancement of the fisheries resources; (3) A mandate to the planning Council to incorporate the fisheries recommendation in the plan or to explain through the public hearing procedure reasons for not adopting the recommendation; (4) The Administrator shall include funds for fisheries coordination, research, and development in his annual budget; (5) A directive to the Federal Energy Regulatory Commission to review all licenses of projects that are associ-

ated with the Northwest regional energy system, and to use the authorities vested by the Federal Power Act to insure that the capabilities of each project are fully utilized to provide operations that are compatible with the plan, including the fishery consideration.

The Committee amendment includes provisions to carry out each of these five recommendations.

The Committee recognizes that the Federal agencies and others in the region cannot correct past mistakes merely by enacting a new law, while many such mistakes, unfortunately may be uncorrectable, others can clearly be corrected or avoided. Money, a reasonable amount of time, clear regulatory authority, and cooperative participation by the various interests will be needed to protect and rejuvenate the fish and wildlife resources of this region. It is not the Committee's intention to make fish and wildlife superior to power or other recognized needs. But it is the intention of the Committee to treat fish and wildlife as a co-equal partner with other uses in the management and operation of hydro projects of this region.

The Committee also believes that BPA and others in the region, including the so-called "power interests", concerned with meeting the power needs of the region have in recent times become more concerned about these valuable natural resources. They testified that they are anxious to accommodate fish and wildlife needs. The Committee believes that this is a hopeful sign and that this bill will help to achieve what appears to be a welcome common objective of protecting and enhancing this resource.

SECTION-BY-SECTION ANALYSIS

SECTION 1. *Short title and table of contents*

This section provides the short title, the "Pacific Northwest Electric Power Planning and Conservation Act" and a table of contents.

SECTION 2. *Purposes*

This section establishes five broad purposes which must be considered by the Council and BPA in carrying out the provisions of this Act. These purposes apply to the Pacific Northwest.

The first is to promote conservation and the efficient use of electric power by BPA, all of its customers, ratepayers and others in the region in order to reduce the need for added power sources, and to encourage the development of renewable resources by BPA and others and to assure an adequate, efficient and reliable power supply for the region, consistent with applicable environmental and other provisions of law. It is intended that the interests of consumers be adequately protected by BPA and the Council in carrying out this purpose, including their interest in assuring that power supplies are acquired at the lowest cost possible.

The second relates to the planning and acquisition process established by the Act. It clearly indicates that widespread participation by governmental, representatives, consumers, the BPA customers, users of the Columbia River System, including governmental and Indian fish and wildlife representatives, and the general public is not only encouraged, but expected, in the development of effective plans and programs related not only to energy conservation, renewable sources, and other resources, but also to protection, mitigation, and enhancement of fish and wildlife. It is also an essential element for the orderly planning of the Federal system.

The third purpose is that the BPA customers and the consumers of those customers will continue to pay all of the costs necessary to produce, transmit, and conserve resources to meet the region's electric power requirements. These costs include those related to fish and wildlife.

The fourth purpose is, in reality, a savings provision. Subject to the provisions of the Act which impose certain

requirements on BPA customers in return for providing by contract benefits under the Act to those customers, this purpose seeks to assure local and State authorities, private and public utilities, and other non-Federal entities that their authorities and responsibilities will be continued and not usurped by BPA. These entities are not intended to be precluded from acting independently of this Act and, under other provisions of law, are given authority to plan, develop, and operate resources and to achieve conservation.

Lastly, these purposes provide that BPA, the Council, and other Federal agencies must carry out their duties and responsibilities and exercise their authorities to protect, mitigate, and enhance fish and wildlife, including related spawning grounds and habitat of the Columbia River and its tributaries. Of particular importance are the anadromous fisheries which are dependent on suitable environmental conditions that generally can be obtained from management and operation of the hydro facilities to protect, mitigate, and enhance these fisheries.

SECTION 3. *Definitions*

This section defines various terms used throughout the Committee amendment.

Section 3(1) defines "acquire" and "acquisition" to make clear that the Administrator, whether he utilizes this Act or other laws, is not authorized to construct or own any electric power generating facility.

As defined in 3(3), "conservation" requires a reduction in electric power consumption as a result of increased efficiency in energy use, production or distribution, as distinguished from reductions from electric power consumption resulting from power shortages or use of alternate energy resources.

Section 3(4) defines "cost effective" as a term used in reference to conservation measures and resources in sections 4 and 6. Pursuant to this definition, a resource or

conservation method is cost effective when compared with similarly available and reliable alternative resources or conservation methods. It must be forecast to be reliable and available within the time it is needed at an estimated incremental cost no greater than similarly available measures or resources. The cost comparison is done on the basis of incremental, or marginal, costs. All estimated direct system costs of a measure are to be included in the projected costs for the purpose of this comparison. In estimating the amount of power, consideration must be given to appropriate historical experience with similar measures of resources.

Conservation under this definition will be cost effective as compared to other resources if the costs of conservation are no greater than 110% of the costs of alternatives.

The definition of "consumer" in section 3(5) serves to distinguish between consumers of power and customers of Bonneville. It does not include the DSI's who are BPA customers.

Section 3(6) defines the Pacific Northwest Electric Power and Conservation Planning Council established by section 4. The "Council" is defined as the voting members appointed to the Council, as distinguished from other Council members who have no vote.

Section 3(7) defines "customer" as anyone who purchases power directly or wholesale from the Administrator; it includes the direct service industrial customers.

Section 3(8) defines a "direct service industrial customer" as an industrial customer that purchases power from the Administrator directly. The definition does not seek to limit those entities who fall under this definition.

Section 3(9) defines "electric power" to mean electric peaking capacity or electric energy, or both. Except where explicitly provided, there is no need in this bill to distinguish capacity from energy.

As defined in section 3(10), "Federal base system resources" means existing and future Federal Columbia River hydroelectric projects, resources already acquired by the Administrator under existing contracts (including the capability of "net billed" plants), and future resources that may be acquired in accordance with this Act to replace the hydroelectric facilities or resources under existing contracts.

Section 3(12) defines "major resources" as any resource acquired by BPA for a period of five years or more having a planned capability of greater than 50 average megawatts. The term however, does not include power purchased under other authority in accordance with the Transmission Act to meet short-term deficiencies in electric power which Bonneville is obliged by contract to supply. Section 6 sets forth separate procedures for acquiring such major resources.

Section 3(14) defines "new single, large load", a term used in the rate provisions of section 7(b)(4) and the sales provisions of section 5(c)(7). In order for a load to be new, it must have the following elements: (1) increase a customer's total power requirements by greater than ten average megawatts and must come on line during any 12-month period; (2) the load must be contracted for, or committed to, by a public body, cooperative or Federal agency customer prior to October 1, 1978 if it is an industrial load or September 1, 1979 if it is other than an industrial load; (3) the load must be new to the system or an existing load not previously served by a preference utility.

This is an important definition in many respects. Although the Administrator will be obligated to sell power to meet these loads, power for new large single loads will be sold at the section 7(f) rates which are likely to be the marginal cost of power. Consequently, enterprises new to the Region will have to pay rates at least as high as rates charged for electric power in other regions unless other electric power consumers want to subsidize the industry.

The definition also will serve to induce DSI's to terminate their existing contracts in favor of new long-term contracts to be offered under section 5(d). The DSI's would, if they could obtain service, be treated as a new large single load and thus subject to the 7(f) rate. This rate would be higher than the rates they would pay under the contracts offered under this bill.

This definition also has application under the section 5(c)(1) exchange. The "average system cost" of the power sold to the Administrator by investor-owned utilities pursuant to this section must exclude the cost of resources needed to serve a new large single load. Thus, the cost of serving new large loads will not be averaged in BPA rates applicable to sales for general requirements of preference customers and for IOU's, residential and small farm customers.

The Committee amendment refers to new loads that are not "contracted for, or committed", as determined by the BPA, prior to the specified dates. The Committee expects the BPA to examine carefully claims that a facility is not a new large single load. The Committee understands that while in some cases actual written contracts do not exist to support such claims, there otherwise is a clear history to support the claim. One large single load, the Mount Tolman Project, which include mining activities cooperatively carried out with Indian and private interests, located on the Coleville Indian Reservation, which would be served by the Ferry County PUD, has such a history. The project was initiated in 1964 and is of special significance in the region. The Committee believes, on the basis of information provided to it, that this large single load would qualify as a committed load.

"Renewable resource" is a resource which uses only regenerative or essentially inexhaustible energy sources, such as solar, wind, hydro, geothermal, biomass, or similar sources of energy either for electric power generation or reduction of a customer's electric power requirements. This

may include direct application devices to reduce power demand. "Breeder" or "fusion" projects cannot qualify as a renewable resource.

Section 3(18) defines "reserves" as the electric power necessary to avert planning or operating shortages of the firm power loads within the region. These reserves can be obtained from contract rights to interrupt portions of electric power supplied to customers or from other resources.

Section 3(19) defines the term "residential use" or "residential loads" as all usual residential or apartment dwellings, including all the first 200 horsepower (cumulative) during any monthly billing period of farm irrigation and pumping loads. This 200 horsepower limit is likely to embrace all "family farms" in the region and some large corporate farms. Large corporate farms that do not qualify would be treated the same as commercial and industrial customers of IOU's.

The term "resource" as defined in section 3(19) includes actual or planned electric power capability as well as reduction in electric power consumption. Thus, conservation could be treated as a resource for the purpose of resource acquisition or billing credits pursuant to section 6. The term "planned" as applied to electric power capability reflects the Committee's recognition that the actual power produced or reduced may be different than the amounts planned to be produced or saved. It is not intended that the BPA Administrator contract for power which he has reason to know will never be produced or will not reduce load.

SECTION 4. *Regional planning and participation*

Section 4(a) establishes by statute a 12-member Pacific Northwest Power Planning and Conservation Council, composed of 11 voting members (4 from Washington, 3 from Oregon, 2 from Montana and 2 from Idaho). The Administrator is an ex officio non-voting member. The voting members are appointed by the Secretary of Energy upon the

recommendation of the Governor of each State. The appointment by the Secretary addresses concerns expressed by the Department of Justice in an October 18, 1979 letter to Chairman Dingell that certain Council functions require that they be appointed consistent with the Appointments Clause, Article II, section 2, clause 2 of the Constitution.

This section provides the procedures to be followed in the nominating and appointing of voting members. The procedure is designed to ensure early appointment of Council members and broad participation by the States in appointing qualified people to serve on the Council. While the Secretary must select nominees from a State list submitted in a timely fashion, the Secretary need not appoint each State nominee, but may decline to do so for any reason. The Governor must provide adequate data about the education, experience, background, and other pertinent data to the Secretary, including data to ensure that the appointee meets the requirements of the Ethics in Government Act of 1978. The Committee expects the States and the Secretary to work together to appoint persons who are well-qualified and who will enjoy the support of a wide spectrum of the public.

The Secretary is authorized to appoint additional non-voting members individuals he determines appropriate. They may include other Federal officials responsible for the Federal Columbia River Power Station hydroelectric projects and for fish and wildlife affected by such system, as well as representatives of Indian tribes, and from the public.

Voting members who are not Federal or State employees will be paid for the actual days they work as Council members, although there is a total annual limit on such compensation. They shall also be allowed travel expenses. All voting members are subject to the Ethics in Government Act of 1978.

Section 4(a)(6) establishes a majority of Council voting members as a quorum and that, except as otherwise pro-

vided specifically in the bill, all actions and decisions shall be by majority vote of the voting members present and voting. This section also provides that in voting for the plan or any amendment thereto the majority must include at least one member from each State. This provision will better ensure that the interest of each State is protected and no jeopardized by a cooperative effort by other States. The Committee believes that it will not be useful to allow a majority of the Council, which could be composed of members of just two States, to approve a plan that applies to all States, unless at least one of the Members representing all the States approve it. The Committee does not favor State vetos in general and this is not a State veto in the normal sense, but in reality, if one or more States object, the plan will probably have little chance of success. A plan will probably never be effectively implemented without State participation.

Section 4(a)(7) provides procedures for the selection of a Council chairman from among the voting members, and procedures for the call of meetings. It further provides opportunities for the submission of a statement of dissenting or additional views by a voting member disagreeing with a Council action or wishing to state additional views.

Section 4(a)(8) through (14) provides the various administrative authorities and obligations of the Council and procedures for establishing the Council's budget and funding. Some of these include: appointment of an executive director and other staff personnel who shall be Federal employees; the authority to request personnel from other Federal agencies; authority to obtain expert and technical studies from other organizations within the region; the authority to enter into contracts in accordance with provisions of law applicable to the Department of Energy; obtaining offices and support from GSA; and determining its organization, practices and procedures, including the annual work program, and the making of such information available to the public.

As for the Council's budget the Administrator must include in the BPA budget the funds necessary for the Council to carry out its responsibilities. The total amount shall be no greater than .02 mills times the kilowatt hours sold by the Administrator the previous calendar year. Anticipating that this ceiling may be too limited, the Committee provided a procedure whereby the Administrator may raise the amount to .10 mills. The Committee expects the BPA and the Council to be judicious in utilizing this authority. To insure this, the procedure requires an annual showing to BPA by the Council of the basis for any request for added funds which must be public. The raise allowed for one year will not automatically be applied in the next.

The Council is a Federal agency, but has a semi-independent character, i.e., it is independent of the BPA. Its principal role is planning and advisory. It is subject to various Federal laws, such as the Freedom of Information Act, the Federal Advisory Committee Act, and Federal procurement laws.

Section 4(b) requires the Council to establish a voluntary scientific and statistical advisory committee to assist it in developing information relevant to the Council's development of a plan. Section 4(c) permits the Council to establish other voluntary advisory committees.

Section 4(d) sets forth the principal responsibility of the Council. The Council is directed to prepare and adopt within two years a regional conservation and power plan. This section permits amendment to the plan and requires review at least every five years. This subsection also requires that hearings be held, prior to adoption of the plan or amendments, in Washington, Oregon, Idaho, and Montana and in any other State in the region which the plan or amendments might impact through the acquisition of resources. 5 U.S.C. 553 shall apply to such hearings. The hearing process provides broad input and participation in the development of a plan and any amendments.

The Committee is concerned that the Council, with its myriad duties, may not meet this planning deadline, particularly if there is a delay in the appointment of Council members. The deadline is intended to be met and it can be met, if all in the region cooperate. While failure to meet the deadline will not result in any penalty, the plan will still be required. Although delay should be avoided, the Committee does not intend that the Council adopt a weak and ineffective plan merely to meet the deadline. A sound and competent plan is expected.

In order to insure that the Administrator, in meeting his obligation, will pursue cost effective conservation and renewables before other cost effective conventional resources, the plan, pursuant to section 4(e)(1), must give priorities to certain resources on a cost effective basis: (1) conservation, (2) renewable resources; (3) resources using waste heat or having high fuel conversion efficiency, and only then all other resources. In each case, a priority must be provided to resources determined by the Council to be cost effective. The Committee is of the view that by establishing conservation and renewables as priorities, the conservation and renewable resource objectives of the bill will be enhanced. This emphasis on conservation in planning for the region is intended by the Committee to be clearly followed. It is the cornerstone of the planning process.

Section 4(e)(2) requires that the plan set forth a general scheme for implementing conservation measures and developing resources pursuant to section 6. Thus, the plan will outline how the objectives contained therein are to be reached. The Council, in developing the general scheme, must give due consideration to: (A) environmental quality; (B) compatibility with existing regional power systems; (C) protection, mitigation and enhancement of fish and wildlife and related spawning grounds and habitats, including sufficient quantities and qualities of flows for successful migration, survival and propagation of anadromous fish; and (D) other criteria which may be set forth in the plan.

Section 4(e)(3) sets forth some of the specific elements a plan must include: (1) an energy conservation program, including model conservation standards; (2) recommendations for research and development; (3) a methodology for determining "quantifiable environmental costs" under subsection 3(3); (4) a 20 years demand forecast for the region; (5) an analysis of cost effective methods of providing reserves; and (6) if the Council recommends, conservation surcharges which BPA may impose on its customers.

The demand forecast will be the Council's estimate, developed with considerable public and BPA input, of the resources needed to meet the BPA's obligations under this Act. It will include the Council's determinations of the BPA obligations which can be met by resources in each of the section 4(e)(1) priority categories. The Committee views the development of a conservation program and the preparation of a reliable demand forecast to be priority matters for the Council's attention because so many of the Administrator's actions are dependent on these considerations.

Section 4(f) addresses the conservation standards to be included in the plan. These standards apply, but are not limited, to (A) new and existing structures, (B) utility customers and governmental conservation programs, and (C) other consumer actions for achieving conservation. The Committee intends that these standards not be applied in a manner that discriminates against any class of customer or consumer.

Pursuant to section 4(f)(2), the Council may recommend, and the Administrator may impose, a surcharge. It would be for those portions of a customer's loads within States or political subdivisions which have not, or for customers which have not, implemented conservation measures applicable to such customers that achieve energy savings which BPA determines are comparable to those obtained under the model conservation standards. The bill provides that surcharges would not be imposed where the Administrator determines with comparable results have

been achieved by the customer through means other than those specifically included in the plan. If implemented, surcharges are to be set to recover the costs attributable to the Administrator on account of the failure to achieve the energy savings projected from such conservation measures. However, there is a 10 percent floor and 50 percent ceiling on surcharges for each customer. The surcharge would be imposed on the customer by BPA, in order to provide substantial incentives for States and localities to adopt effective conservation measures and thus accelerate achievement of conservation objectives. At the same time, with the limits imposed on the surcharges, States' and localities' prerogatives are reasonably protected.

Section 4(g) seeks to insure broad public participation in the development of regional power policies. The bill provides opportunities for the Indian tribes of the region to participate in the Council's activities. The Committee believes that their participation should help to ensure widespread acceptance of the plan. The Committee has been assured by their representatives that they want to cooperate in carrying out the bill's purposes.

Section 4(h) is designed to provide effective procedures and authorities whereby fish and wildlife of the Columbia River Basin will be treated on a par with power needs and the other purposes for which the hydroelectric dams of the region were built and are operated and maintained. This should ensure a balance for all uses of the river.

Once the Council has been appointed and it begins its task developing a plan, it must send a written request to all of the State fish and wildlife agencies in the region, the Federal Bureau of Sport Fisheries and Wildlife, the National Marine Fisheries Service, and the appropriate Indian tribes located in the region for appropriate recommendations. Each will have a minimum of 90 days to reply, although this period may be extended if necessary. The Committee expects the Council to be reasonable in respond-

ing to requests for extensions and that the above entities will act promptly to develop effective recommendations.

The recommendations must be accompanied by data to support them. The better the data, the more likely it is that the recommendations will receive wide support. While the Committee believes it reasonable to expect organizations with fish and wildlife expertise to be able easily to provide needed support data, the Committee also recognizes, and the Council should also, that 90 days will not afford an opportunity for extensive studies, the acquisition of new data, or the development of the best scientific knowledge. The data requirement is to enable the Council and others to understand the recommendations. The quantity or quality of the data should not serve as a basis for turning down any recommendation.

Once recommendations are made, an expedited public review process, including hearings, and an opportunity for power interests and others to also submit comments and recommendations, will be conducted by the Council. Thereafter, if the Council determines that any recommendation is not inconsistent with the purposes of this Act, the recommendation must be adopted by the Council. The Committee wants to stress that adoption of these recommendations is not intended to be delayed pending adoption of any plan or revision; the Council should act promptly on all recommendations. Also, the amendment clearly contemplates that the Council and these entities will, to the greatest extent possible, work together to develop effective and workable recommendations. The Council is not asked to rubber-stamp any recommendation. However, neither is it expected that the fish and wildlife agencies or Indian tribes shall be required to agree with each other or with the power interests and others in the region to what might be aptly described as "consensus" recommendations in order to satisfy all interests. Any determination must set forth the reasoning in support of that determination and will be subject to judicial review.

The recommendations are clearly required to include, as appropriate, a broad range of measures which could, for example, be regulatory or management-type, to "protect, mitigate, and enhance" fish and wildlife and their spawning grounds and habitat. The objective is to give flexibility to all concerned to devise effective and imaginative measures that are also reasonable and will not result in unreasonable power shortages or loss of power revenues. Some power losses, with resultant loss in revenues, may be inevitable at times if these fish and wildlife objectives are to be achieved. Such losses, however, should not be a burden on the consumers of the region. The objective, however, should be to avoid, or at least minimize, losses, while meeting fish and wildlife needs. The Committee does not intend that these provisions be used to subvert the power objectives of this bill.

It has been suggested that the terms "protect, mitigate and enhance" should be defined. The Committee did not choose to do so in recognition of the fact that these terms are not new to those concerned with this resource, and because such a definition might later prove more limiting than anticipated.

At the same time, the Committee does not intend that these terms be construed in broad terms that biological and economic considerations will be totally ignored. They must be considered. However, cost should not be a deterrent if a fish and wildlife need might be sacrificed to save dollars.

SECTION 4(h) also requires the BPA to use the BPA fund its statutory authorities to protect, mitigate, and enhance fish and wildlife in a manner consistent with an adopted plan, including the above recommendations, and with the purposes of this legislation. It is important to stress once again that the recommendations may well precede the plan. If so, BPA and others should not delay their implementation pending adoption of the plan which will incorporate these recommendations.

Section (h) also provides a directive to BPA and other Federal agencies responsible for the management or operation or regulation of hydro facilities on the Columbia or its tributaries to adequately protect, etc., fish and wildlife affected by such facilities in a manner that ensures equitable treatment for fish and wildlife with other purposes for the facilities. This provision does not replace other provisions of law such as FERC's section 10 of the Federal Power Act, but supplements it. This provision is also aimed at placing fish and wildlife on a par with these other purposes.

Section 4(i) requires actions of the Administrator pursuant to section 6 to be consistent with the plan and amendments thereto unless otherwise provided. This subsection also provides that, except in the case of major resources which are subject to section 6(c), the Council shall advise the Administrator of those section 6 actions it will review for consistency with the plan. Thereafter, the Administrator must make an initial determination of consistency for proposed actions and notify the Council at least 60 days prior to taking such action. Within 60 days thereafter, the Council may direct the Administrator to hold a hearing as to the consistency of the proposed action with the plan. A failure by the Council to require a hearing is deemed a determination that the proposed action is consistent with the plan. After the hearing, BPA makes the final determination.

The requirement that actions be consistent with the plan is vital to the plan's effectiveness. However, the Committee is of the view that procedures available to check on such consistency should not be used in such a way as to frustrate the overall purpose of the plan or BPA in meeting its obligations. Any final determination by the Administrator to proceed is judicially reviewable pursuant to section 9(e).

Section 4(j) permits the Council to request the Administrator to take certain actions under section 6 to carry out BPA's duties under an adopted plan.

Within 90 days after receipt of the Council's request, the Administrator must indicate how he will carry out the

request or any portion thereof, or explain why he believes the action to be inconsistent with the plan or his contractual obligations or other provisions of law and give reasons therefor. If the Administrator decides not to carry out the Council's request, the Council can require a section 7(i) hearing on the Administrator's decision and the proposed action. BPA's final decision must be based on substantial evidence, but this does require a proceeding under 5 U.S.C. 554-557.

The Committee has included this rather extraordinary authority for the Council to provide it with a limited check on the extent to which the Administrator implements an adopted plan. It is intended that the Council use this authority judiciously. Clearly, some effort should be made by the Council to consult with the Administrator in advance of triggering this provision to minimize problems and to encourage voluntary actions by BPA. At the same time, the Administrator should cooperate and be receptive to the Council's suggestions. Clearly, the BPA has flexibility to adopt the proposed actions with modifications, if necessary in order to avoid a complete rejection of the suggestion.

Similarly, the Committee included subsection (i) as a means to check on BPA's actions under section 6. Of course, before the Council can exercise this authority, there must be a plan, and so prompt plan development and adoption is important. The Council and the BPA Administrator should work together. The Council need not rubberstamp the BPA actions. However it should also be flexible. Both should always keep an eye on the purposes of this bill and make sure that their proposals are always consistent with those purposes.

Once the plan is adopted, the Council's expenditures should not be as great as they may be prior to planning. At that same time, the Council has a continuing and important role under subsections (h), (i), and (j) in addition to its responsibility to review the plan and consider future

changes. The Council is expected to exercise its responsibilities under section 4 carefully and diligently.

Section 4(i) and (j) require that such hearings be conducted in accordance with procedures set forth in section 7(i). Those procedures, if misused, could frustrate the objectives of the Committee in reporting this legislation. The requirement that actions be consistent with the plan is vital to the plan's effectiveness. However, the Committee does not intend that the procedures available to check on such consistency should be used by the Council or any interested person in such a way as to frustrate the overall purpose of the plan or the BPA in meeting its obligations. To avoid such a possibility, the Committee expects the hearing officer to carry out his duties expeditiously and fairly. Although an adequate record is needed, delay is not.

Any final determination by the Administrator is judicially reviewable pursuant to section 9(e).

Section 4(k) reaffirms the bill's intent to encourage broad participation in the planning process. By soliciting opinions from its customers, the Administrator and the Council will have access to additional valuable information. This section also affirms the bill's intent not to abridge authorities of State and localities, electric utilities and other non-Federal entities. Similarly, section 4(l) provides a mechanism to open the planning process to regional governmental bodies' ideas and initiatives, including Indian tribes.

Section 4(m) requires that by October 1, 1986, the Council conduct and complete an analysis of conservation measures implemented and renewable resources acquired under the Act since enactment for the purpose of making certain determinations set forth in this section. Once the BPA receives the Council's analysis (which shall be available to the public) the Administrator may determine that section 3(4)(D) shall no longer apply any particular conservation measure or resource if he finds any result or effect

described in the referenced section. Like other BPA determinations, this one is also subject to judicial review.

SECTION 5. *Sale of power*

Section 5(a) makes clear that all power sales, including exchange sales, under this bill are subject at all times to the preference provisions of the Bonneville Project Act, as discussed earlier in this report. These provisions retain and assure preference and priority in BPA power sales to public bodies and cooperatives. This provision works together with a number of other provisions contained in this bill (section 5(b)), which provides that sales to preference customers cannot be restricted to less than the full amount of power from Federal base system resources; section 5(b)(2) which states that the five-year pullback provisions of the Project Act will apply to all investor owned utility contracts; section 7(c)(1)(A) tying the rate for preference customers to the costs of Federal base system resources; and the rate ceiling in section 7(b).

Section 5(b)(1) requires the Administrator to offer to sell to each preference agency and to each investor-owned utility the firm power it needs to meet its firm power load within the region to the extent that it cannot meet its load with its own resources. Those resources must be the resources that will be used to serve its firm load in the region.

Section 5(b)(2) is a reaffirmation of the five-year pullback provision of the Bonneville Project Act.

Section 5(b)(3) authorizes the Administrator to sell electric power to Federal agencies in the region. Although Federal agencies are not preference customers, these Federal agency customers have depended upon the Administrator for power supply. It is intended that BPA will continue to serve them.

By requiring that preference customers, IOU's and Federal agency customers comply with the Administrator's standards for service, Section 5(b)(4) ensures that the

Administrator will not be required to serve any technologically-unprepared customer that cannot meet the necessary technical service criteria. BPA may periodically review and revise these standards.

Pursuant to section 5(b)(5), the Administrator is to include in the contracts for the sale of power to utilities provisions permitting restriction of his obligations to meet such customers' full requirements during any period of insufficiency. In the case of public bodies, cooperatives and Federal agencies, the contract must specify a reasonable period between the date the notice is issued and the date it is to take effect. With the authority to acquire power, such insufficiency would be for that period of time required for BPA can acquire additional power resources. The phrase "on a planning basis" is intended to clarify that BPA will make determination of power entitlements or allocations on reasonable future estimate, under this section. This does not reach power deliveries during operating curtailments which is a matter for State and local governments.

By specifying the amount of power to which preference customers and Federal agencies are entitled, Section 5(b)(6) ensures compliance with the preference clause by guaranteeing that preference customers as a group and Federal agencies may not be contractually restricted until their loads exceed the firm capability of the Federal base system resources. It also permits individual preference customers better to plan to meet their future powers needs by enabling them to determine the minimum amount of power they will receive in the event of an insufficiency.

SECTION 5(c) permits power exchange and power sales whereby rate relief will be provided residential customers of investor-owned utilities. Although all utilities are permitted to enter into such sales, its benefits are likely to be limited to utilities that are not entitled to service as a preference customer. The sale is permitted where a utility offers for sale to the Administrator an amount of electric

power equal to that utility's residential load. When such an offer is made the Administrator shall acquire, by purchase, such power at that utility's average system cost and shall offer to sell the same amount of power back to the utility at the rate charged preferenced customers for their general requirements for resale to that utility's residential users within the region only. There is an exception for utilities where service lies both within and without the region as defined in section 3. The requirement is not likely to result in parity in the retail rates being paid by customers of preference customers and consumers of investor-owned utilities, but it should equalize the wholesale costs of the electric power with a resulting benefit the investor-owned utilities' customers.

Average system cost is established pursuant to section 5(C)(7) and the rates for resale are established under section 7(b)(1). Section 5(c)(2) ramps in the exchange from 50 percent of the residential load in the year beginning July 1, 1980 to 100 percent in the year beginning July 1, 1985.

The cost of the exchange during the first five years is charged to the rates applicable to DSI's under section 7(c)(1)(A). Testimony given to the Committee indicated that it was necessary to phase in the exchange in order to minimize the dramatic rate increases to the Administrator's direct service industries.

SECTION 5(c)(3) requires that the benefits of this exchange be passed directly through to residential customers.

SECTION 5(c)(4) permits a utility to terminate the exchange if the rate ceiling of section 7(b)(3) is applied and the resulting surcharge makes the exchange uneconomic to the utility. The terms and conditions of any termination must be mutually agreed to in advance of any termination.

SECTION 5(c)(5) provides that although the Administrator must offer to sell an amount of power equivalent to the residential load of the utility, BPA may obtain the power from other sources if it is available at less cost

than the cost of purchasing the power offered by the utility. Such acquisitions are subject to the provisions of sections 4 and 6.

Pursuant to section 5(c)(6), a utility exchanging power under this section will receive, in the event of insufficiency, an entitlement to the amount of power acquired by the Administrator from, or on behalf of, such utility and the exchange of power would continue during period of declared insufficiency.

Section 5(c)(7) provides for establishing the "average system cost," as that term is used in section 5(c)(1) by BPA in consultation with the Council, BPA's customers, and the State ratemaking agencies. This method is subject to review and approval by the Federal Energy Regulatory Commission. The average system cost may not include (a) the cost of additional resources needed to serve new large single loads, (b) the cost of additional resources needed to serve load growth outside the region, (c) the costs of any generating facility which is terminated prior to commercial operation. The term "new large single load" is defined in this section to mean any load that will result in an increase in power needs of 10 or more average megawatts in any consecutive 12-month period.

Section 5(d) authorizes the Administrator to sell power to existing direct service industrial customers that have a BPA contract at the date this bill is enacted. Initial long-term 20-year contracts are to be offered by BPA to these customers in accordance with section 5(g). In return for these new contracts, the DSI's would have to agree to terminate their current contracts. Subsequent contracts for these DSI's are authorized but not mandated. The initial contracts shall provide each direct service customer an amount of power equivalent to that which such customer is entitled under its existing contract dated January or April 1975 for the sale of "industrial firm power." These power sales to these existing direct service customers will also provide a portion of the Administrator's reserves for

firm power loads within the region. The bill is silent on peaking reserves, but it is presumed that they would be similar to those under present contracts.

The amount of power the DSI's are entitled to receive under these initial contracts is expressed in section 5(d)(1) in terms of an entitlement under their present contracts, rather than in terms of the amount of power being used at a particular time.

The contracts with the DSI's now provide reserves for the region. These are basically capacity reserves and energy reserves. Under certain conditions, BPA can interrupt power sold to DSI's. Capacity reserves permit brief interruptions of the entire DSI load and repeated two-hour interruptions (up to five minutes) of half the load. In this manner, the authority to interrupt provides peaking reserves and reserves for forced outages and system reliability. The energy reserves are of two types, an operating reserve and a planning reserve. An operating reserve of roughly 25 percent of the DSI load which may be interrupted including instances of low or critical stream flow conditions or an account of the unanticipated growth of regional firm loads; in order to protect the Administrator's firm loads within the region at any time and for any period, as determined by BPA. A planning reserve is an additional 25 percent of these DSI loads which may, upon advance notice, be withdrawn to protect firm loads from projected peak and energy deficits caused by the Administrator's planned resources being delayed or available at a lesser capability than planned.

The BPA provides credits to the DSI's for power interruptions under current contracts. The GAO, in its September 1979 report, discussed the credits then established for such interruptions as follows:

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ber 1979 report, discussed the credits then established for such interruptions as follows:

When BPA exercises the right to interrupt the DSI loads for more than one hour, it grants the DSI's discounts known as availability credits. During a 3½ year period (January 1975 through June 1978) BPA withheld almost 9 billion kilowatt hours of energy, which is equal to about 9 percent of the total planned DSI load for that period. For these interruptions, the DSI's were granted a total of almost \$38 million in credits — about 14 percent of BPA's gross sales to them.

When they are interrupted, DSI's are granted availability credits in a series of steps. The first step grants a credit of almost \$7 million to be shared by all the DSI's when the power interruption lasts for more than one hour but does not exceed 5 percent of the total energy requested during the year. The next step grants an additional \$10 million credit when the energy restricted exceeds 5 percent but is not 10 percent.

The GAO also said in the report that during January 1979, such credits tended to cause BPA power system schedulers to delay interruption of DSI loads because of the cost to BPA. However, they ultimately did so.

The BPA has since revised these credits and is expected to examine them again in connection with the new contracts.

The Committee amendment calls for new DSI contracts. The amendment does not require that they be identical to the current contracts concerning reserves, credits, and other matters, but provides BPA with considerable flexibility to prepare and negotiate contracts and adopt rates that insure that conditions relating to reserves are not so stringent as to render the reserves provided by the DSI's largely ineffective. As noted, the GAO expressed concern that previous rates adopted by BPA for DSI sales inhibited the use of reserves furnished by the DSI contracts.

Additionally, since the linchpin of this legislation is conservation and regional planning, the Committee expects that the DSI's will do their part to conserve energy and cooperate with BPA and the Council in the implementation of any plan adopted by the Council.

The Committee is aware that one of the direct service industrial customers entitled to an initial contract under this section, Alumax Aluminum Co., has not begun construction of its proposed aluminum reduction plant at Umatilla, Oregon, because of litigation and other factors. Since the Pacific Northwest faces potential major power shortages in the early to mid-1980's, the BPA should examine whether the initial contract offered Alumax should provide for delayed construction and operation of the plant to allow the region to cure the predicted power shortages. Further, before power is acquired by Bonneville to serve this load, there should be contractual assurances regarding the dates of completion and operation of the reduction plant.

Section 5(d)(2) expressly prohibits sale to new DSI's.

Section 5(d)(3) prohibits BPA from selling to existing DSI's amounts of power in addition to their entitlement except in accordance with strict procedures. These procedures require the BPA to determine that such sales are consistent with the plan. Also, the Council must approve such sales. This limitation and the amount of power available to DSI's should serve as significant incentives for the DSI's to conserve that power for the purpose of additional DSI production.

Under existing contracts, the DSI's quality to receive additional power for the purpose of making improvements not related to increasing a DSI facility's level of production. The Committee understands that this has been interpreted by BPA to include such measures as pollution control devices which, of course do not, relate to a facility's production. Although this power is probably included as part

of the current entitlement of the DSI's, the Committee expects the BPA to be assured that such power does not fall into the category of new power sales to increase production under such 5(d)(3).

Section 5(e)(1) insures that customers' contractual entitlement to firm power will not be restricted below the amount of power which they are providing the Administrator pursuant to section 6 and further requires that any excess of such entitlement in any given year shall be made available to other customers of the same class. This section also defines which customers are of the same class. Section 5(e)(2) ensures that entitlements of a customer (under subsection (e)(1) are additive.

Section 5(f) provides that power that is not needed to meet BPA's obligations under subsections (b), (c), and (d) is to be sold in accordance with this Act and existing law.

Section 5(g)(1) specifies that the Administrator must simultaneously offer appropriate customers the initial long-term 20-year contracts and initiate negotiations with such customers within nine months after enactment. The customer has one year to complete negotiations and accept the offer or lose the benefits of these provisions.

Section 5(g)(3)-(5) concern the acceptance and effective date of power sales contracts under the Act and in particular, ensure that the benefits of the 5(c) exchange begin on a specified date even if the DSI contracts are not executed until later.

Paragraph 5(g)(6) places a floor under the power entitlements of individual public body, cooperative and Federal agency customers in the event of an insufficiency during the initial contract. A minimum contractual entitlement enhances the customers' ability to plan.

Section 5(g)(7) is intended to ensure that a challenge (on the basis that the Administrator lacks legal authority on account of insufficient power resources) to the initial

contracts required to be offered under this Act will not be sustained. In obtaining new resources, however, BPA must do so in accordance with this bill. This provision does not override any other provision of this bill. To the extent that additional power is required to meet these initial contract commitments, BPA can use its existing short-term authority as well as its authority under this Act.

SECTION 6. Conservation and resource acquisition

Section 6(a) requires the Administrator to acquire conservation, conservation measures and renewable resources installed by residential and small commercial consumers in meeting his obligations to satisfy the load of his customers. These measures and resources must be consistent with the priority tests of section 4(e)(1) and the considerations of section 4(e)(2). The Administrator need not await a plan to utilize this authority. He must, however, apply these section 4(e) provisions to the proposed acquisition. A nonexclusive list of authorized conservation measures is provided in this subsection.

Section 6(a)(3) contains the BPA's authority to acquire resources other than conservation and end-use renewables to meet contract obligations after taking into account conservation. This expanded authority is distinguishable from the Administrator's existing authority in accordance with the Federal Columbia River Transmission Act which permits the Administrator to purchase power on a short-term basis to meet temporary deficiencies in electric power which he is obligated by contract to supply.

Except as specifically provided elsewhere, section 6(b) provides that acquisition of resources pursuant to section 6 are to be consistent with the plan developed by the Council under section 4. If the resources are not consistent with the plan, or if there is no plan in effect, then the Administrator may acquire these resources so long as the Administrator determines that they are consistent with the priorities and considerations of section 4(e)(1) and 4(e)(2). This

determination, where the resource is not consistent with the plan, is subject to the procedural requirements of section 4(1). If the resource is a major resource, the acquisition must be in accordance with section 6(c).

In acquiring a resource under this section, the Administrator will not own or construct any generating resources. The Administrator's acquisition will be by contract to pay for the capability or, in some cases, a specific amount of power from a utility's system or power associated with a generating resource or conservation resource or group of resources.

Section 6(b) stresses the BPA, in acquiring these other resources, shall not reduce efforts to achieve greater conservation.

Section 6(c) sets out the procedures for the acquisition of a major resource, the implementation of a conservation measure that will conserve an amount of power equivalent to a major resource, an agreement to reimburse investigations and pre-construction expenses for a major resource or to grant billing credits or services involving a major resource. For each such proposal, the Administrator must (A) publish notice, with copies to the Council and, as appropriate, the Governor of a State where a facility is to be constructed or a conservation measure implemented; (B) conduct public hearings; (C) develop an administrative record; and (D) prepare a written discussion, including a determination of whether the proposed acquisition is consistent with the plan, or notwithstanding its inconsistency with the plan, a finding that it is needed to meet the Administrator's obligation under this Act. If no plan is in effect, then the Administrator must find that the proposal is either consistent or inconsistent with the criteria of section 4(e)(1) and the considerations of section 4(e)(2).

If either the Administrator or the Council determines that the proposal is not consistent, the Administrator may not proceed until the expenditure of funds for the proposal

has been specifically authorized by an Act of Congress through the budgetary process required under the Transmission Act. After that, he must wait 90 days. All acquisitions must comply with all applicable environmental laws, as well as other applicable laws.

Section 6(d) authorizes the Administrator to acquire a non-major resource which is experimental, developmental, demonstration, or a pilot project type so long as the resource is a potential for cost-effective service to the region is included in the Administrator's budget submitted to Congress. Again, "acquisition" does not include actual construction.

Section 6(e) provides a list of certain of the Administrator's conservation authorities and requires that the Administrator make maximum practicable use of such authorities to give effect to the priority for conservation and direct-applications renewable resources. Section 6(e)(2) explains that to the extent conservation measures or resource acquisitions require direct arrangements with consumers, the Administrator shall make maximum practicable use of his customers and local entities.

Section 6(f) authorizes the Administrator to support the sponsors of resources that the Administrator determines may be eligible for future acquisition. For such resources, the Administrator would be authorized to enter into agreements with the sponsors of any resource to reimburse certain expenses. If the resource is renewable, but not a major resource, the Administrator can fund or secure debts incurred in the investigation and initial development of such resource.

In the case of resources, other than these renewable resources, the BPA can reimburse investigation and pre-construction expenses (not including the costs of capital equipment or construction material) subject to the following requirements: (1) the reimbursement may only be exercised where the Administrator determines at the time

of the contract that a failure to do so would result in extreme or unusual hardship; (2) it can only reach expenses incurred after enactment of this Act; (3) the agreement shall provide the Administrator with an option to acquire such resource; (4) the agreements provide that if the resource is ultimately developed, then the developer shall pay all such expenses; (5) it is authorized only if the resource is subsequently denied State siting approval or other necessary permits, the investigation subsequently demonstrates that the resource does not meet the bill's criteria and considerations for acquisition, or if the Administrator decides not to purchase the resource and the sponsor decides not to construct it; (6) the agreement provides that the Administrator will recover any funding in the event that the sponsors decide to construct the resource after the Administrator has decided not to acquire it. Expenses incurred by a sponsor after denial of a State siting approval or after BPA's determination about the relationship of the resource to the plan or section 4(e) are not reimbursable, excepting those reasonably necessary for the liquidation of the resource.

The purpose of this section is to permit the region where necessary to share certain resource sponsor expenses when it is anticipated that the region will be sharing in the benefits of this resource.

Section 6(g) makes clear that the preparation of joint State and Federal environmental impact statements apply to resources acquired under this Act is encouraged as provided by existing laws and regulations.

Section 6(h) authorizes the Administrator to grant billing credits to customers and provide services if, by undertaking independent conservation or resource programs, they reduce the Administrator's obligation to acquire resources. These are both mandatory credits and discretionary credits, but in either case, the amount of the credit can never be set at a level that results in costs for the Administrator's other customers greater than the costs

those customers would have experienced had the Administrator acquired the needed resources directly.

Mandatory credits apply to: (a) independent conservation activities of BPA customers or political subdivisions served by those customers which reduce BPA's obligations to acquire resources; and (b) independent resources of customers or political subdivisions constructed, completed, or acquired after the effective date of this Act and which also reduce BPA's obligations. This latter category is renewable, multipurpose projects, or other resources.

Discretionary credits apply to resources that reduce the obligation of the Administrator to acquire resources and that are not inconsistent with the plan, or if no plan is in effect, not inconsistent with section 4(e)(1) and (2).

Calculations of power savings are to be based on actual change in customers' requirements for power or reserves. It is the Committee's intention that for eligible resources receiving some financial assistance from the Administrator such assistance will be subtracted from the calculation in determining the net credit for that resource and that eligibility for billing credits shall cease if the Administrator acts pursuant to the plan to acquire the resource or mandate the conservation program. The Committee also views participation shares in a jointly-owned or operated resource as creditable resources of the participant, if they meet the requirements of this subsection. There is also significant value to the Administrator's customers in knowing whether or not their resources will receive credits, and thus the Committee intends that discretionary eligibility standards and calculation of actual credits will follow the general eligibility conditions for the mandatory credits. The exact size of the credit will give individual utilities ample incentive for local investments while preserving for other customers of the Administrator the rates and costs they would have paid in the absence of the individual utilities' action.

The amount of the credits is determined by different formulas set forth in the subsection. Conservation credits are to be set at the level at which the rate impact to the Administrator's other customers is the same as the rate impact such customers would have experienced if the Administrator had acquired resources in the same amount. Resource credits are to be based on the net costs actually incurred by the utility in acquiring the resource but the credit may not be greater than the cost of resource acquired by BPA from other resources.

Retail rate structures voluntarily implemented by a customer which induce conservation, or installation of consumer owned renewable resources will qualify for billing credits if they meet the same type of performance standards as are required from other conservation or resource activities under this subsection these rate forms are not limited to those studied by the Council pursuant to section 9(i)(1).

Before granting any credit, the Administrator must notify customers and the Council, explain the method he proposes to use in determining the amount of the credit, and permit them a reasonable time to express their views. All major resource credits must follow section 6(c).

Section 6(i) requires the Administrator to include in BPA contracts enforceable terms and conditions which will allow it to exercise effective oversight for all resources it acquires, including conservation activities for which it provides billing credits. Such terms and conditions may vary depending on the particular resource, and its potential impacts on BPA ratepayers.

This provision was strengthened significantly as a result of the Subcommittee's investigation of the net billed plants with the help of the GAO. The Committee expects that BPA will exercise responsibilities by BPA in such a way that cost overruns such as those experienced at the net billed plants will be minimized or avoided. It is intended that the BPA will have an active role in monitoring the

building and operation concerning such resources. To do this, BPA will have to expand its capability to oversee such activities.

Section 6(j) makes it explicit that the Act does not authorize any form of "Federal guarantee" for bonds sold to finance resources acquired by the Administrator. All contractual and other obligations required of the Administrator under the Act are secured solely by Bonneville's revenues. The full force and credit of the United States is not pledged. In addition, all offerings and promotional material for resources acquired by the Administrator under this Act must specifically state that the obligations are not guaranteed by the Federal government. The Committee will watch BPA's activities under section 6(i) and (j).

Section 6(k) requires that financial assistance, billing credits and other benefits be distributed equitably to each class of customer throughout the region.

Section 6(i) directs the Administrator to investigate opportunities for adding to the region's resources through the accelerated or cooperative development of renewable resources located outside the region and opportunities for mutually-beneficial interregional exchanges of power that reduce the need for additional generation or generating capacity in the Pacific Northwest and regions with which such exchanges may occur.

Paragraph (2) of subsection (1) authorizes and directs the Administrator periodically to investigate opportunities for mutually beneficial interregional exchanges of electric power that reduce the need for additional generation or generating capacity, with emphasis upon reduction of additional generation in the Pacific Northwest and the regions with which such exchanges may occur. Similar exchanges implemented in the past have demonstrated the mutual benefits that regional exchanges can achieve. The Council is required to consider such investigations and interregional exchanges in formulating the regional conservation and electric power plan mandated by section 4.

Paragraph (3) authorizes the Administrator to acquire resources consistent with such investigations and consistent with the plan or, if no plan is in effect, with the priorities of section 4(e)(1) and the considerations of section 4(e)(2).

Section 6(m) requires the Administrator to determine that a reasonable share of the resource to be acquired, or a reasonable equivalent, has been offered to each Pacific Northwest utility for ownership, participation, or other sponsorship. This provision is important because under section 5(e) each utility's entitlement will include those additional resources the utility has sold to the Administrator under section 6.

SECTION 7. *Rates*

Section 7(a) requires that the Administrator periodically review and set BPA rates to recover the Administrator's total costs, including amortization of the Federal investment in the Federal Columbia River Power System and specifies the applicable laws upon which FERC shall approve and confirm the Administrator's periodic rate filings, including the rates paid by BPA for purchased power. As recommended by FERC, these laws include the Flood Control Act of 1944. The costs include those incurred under section 4(h) of the Committee amendment, but they do not include, as recommended by FERC, an "allowance for contingencies".

Section 7(b) establishes the rates for power sold to meet the general requirements of public bodies, cooperatives, and Federal agency customers within the Pacific Northwest, and for sales under the 5(c) exchange. This rate will be the Administrator's lowest firm power rate. Section 7(b)(2) establishes a "rate ceiling" for preference customers that seeks to assure these customers that their rates will be no higher than they would have been had the Administrator not been required to participate in power sales or purchase transactions with non-preference customers under this Act. The assumption to be made by the Administrator in establishing this ceiling are specifically set forth. It is

through rate ceilings that this Act provides additional protection to public bodies and cooperatives' preference customers as to the price of the sale of power by the Administrator. In the event that this rate ceiling is triggered, then the additional needed revenues must be recovered from BPA's other rate schedules.

Section 7(c) prescribes the rates applicable to direct service industrial customers. Prior to July 1, 1985, the direct service industrial customer rates are set to recover the cost of resources required to serve such customers' loads, plus the otherwise unrecovered net costs of the section 5(c) exchange for the benefit of residential consumers in the region. After July 1, 1985, the rates are required to be equitable in relation to the retail rates charged by the Administrator's public body and cooperative customers to their industrial consumers in the region. Direct service industrial rates are to be adjusted to take into account the value of power system reserves available to Bonneville through its contract right to interrupt service to such customers.

Section 7(d) permits the Administrator to apply constraints to the rates of customers with low system densities. This is intended to afford greater equity to consumers of small rural co-ops which have high distribution costs due to difficult terrain, remote service areas, or other factors.

Section 7(e) clarifies that the Administrator may establish a uniform rate for the sale of peaking capacity and that the rate directives of this Act govern the amount of revenue the Administrator collects from each class of customers, not the rate form.

Section 7(f) establishes the rate or rates for sales to investor-owned utilities other than sales pursuant to the section 5(c) exchange, preference customers for power needed to meet the requirements of new large single "loads" and all other miscellaneous sales. This rate has sometimes been termed a new resource rate and does not preclude the

establishment of more than one rate under this provision if circumstances make a separate rate for a separate load or demand necessary or appropriate.

Section 7(g) accommodates the need to allocate across all rates those costs that cannot be allocated to particular rates to meet the requirement of section 7(a). BPA's obligation and that of the customers is to ensure that all costs are recovered. BPA also has an obligation to keep costs reasonable while carrying out its contractual and statutory obligations fully. This subsection further provides that all costs and benefits will be allocated to the various rates consistent with the provisions of this Act and, as appropriate, generally accepted ratemaking principles and specific directives of this Act.

Section 7(h) requires the Administrator to adjust rates if necessary in order to collect additional charges for failure to comply with standards established pursuant to section 4(f) and to allocate revenues from such surcharges in a way that will help achieve the purpose of section 4(f).

Section 7(i) establishes rather detailed procedures for ratemaking. The Committee amendment clarifies the procedures adopted by the Senate to ensure adequate and effective review of BPA rates and revisions thereof. It is the clear intent of the Committee that no one may use these procedures to frustrate the Act or to delay rate revisions. The BPA must act fairly to ensure full public and customer input, but dilatory tactics must be avoided. Few relish rate changes that result in higher rates, but often they cannot be avoided. The burden is on BPA to justify increases. These procedures should ferret out unjustified or inadequately supported changes.

This section also authorizes FERC to approve BPA's rates on an interim basis. FERC is authorized to establish procedures for this purpose, including provision for refunds if the final rate approved by FERC is less than the interim rate. FERC should act promptly to adopt such procedures.

Section 7(j) required the Administrator to provide information in rate schedules and billings to its customers on the cost of different resource categories and new resources. It allows the customer and, if included in the customer's bill to its ratepayers, the ratepayers of that customer to identify the costs of load growth.

Subsection (k) reaffirms that all rates or rate schedules proposed by the Administrator for the sale of non-firm energy outside of the region, but within the United States, shall become effective only after review by the Federal Energy Regulatory Commission for conformance with the requirements of existing law applicable to BPA sales: the Bonneville Project Act, the Flood Control Act of 1944 and the Federal Columbia River Transmission System Act. FERC's review will be based on the BPA record and on any subsequent FERC proceedings. In performing its review, the Commission shall afford any party to the BPA proceedings conducted under section 7(i) an opportunity for an additional hearing, to be conducted in accordance with procedures established by the Commission for ratemaking under the Federal Power Act. This section does not alter the authority of the Administrator under existing law, but supplements that authority. The second hearing requirement at FERC is intended to afford all parties fair opportunity to challenge BPA rates. However, it should not be allowed to become burdensome or dilatory.

To protect regional consumers from the economic penalties of selling low and buying high in dealings with Canada, section 7(l) permits the Administrator to negotiate or establish rates for sales outside the United States at levels which are equitable in view of the rates charged by non-U.S. entities to the Administrator or his customers. The BPA must give notice of proposed negotiations and notice of the rate agreed to as a result of such negotiations. The first notice, however, does not require BPA to reveal its negotiation strategy or its rate proposal.

SECTION 8. *Amendments to existing law*

Section 8(a) and (b) are technical amendments to the Transmission Act necessary on account of this Act.

Section 8(c) amends the Transmission Act in a more substantive way. It makes clear that the Administrator's ability to borrow does not include authority to borrow for the purpose of acquiring power from a major generating facility under section 6. This responds to the concerns of the Department of the Treasury and others relative to a Federal guarantee of the Administrator's acquisitions. Secondly, this section alters the terms on which the Administrator may borrow from Treasury. The Administrator is not permitted to borrow on the open market since BPA is required to borrow from Treasury. Treasury now charges the Administrator a rate equivalent to that of certain utility bonds sold on the open market. This bill specifies that the rate shall be the rate Treasury borrows plus a sufficient markup to raise the total rate to the level of similar bonds sold by other government agencies.

Lastly, this section raises the Administrator's borrowing limit of \$1.25 billion to \$2.5 billion effective in fiscal year 1982. The entire increase would be for a revolving fund for conservation and renewable resource loans and grants. It is subject to annual appropriations. It is intended that if such funds are funneled for this purpose through utilities to local customers, they shall be deemed to be the Administrator's funds.

Section 8 amends also Public Law 88-552 so that the definition of the term "Pacific Northwest" will coincide with that used in this Act.

SECTION 9. *Administrative powers*

Section 9(a), although apparently broad, is a technical provision that integrates the Administrator's authority under this Act with its authority under the Bonneville Project Act. Only insofar as it incorporates the authority necessary to carry out this Act does it expand existing BPA authority to contract. By allowing the same contracting

authority as exists under present law, this provision is intended to eliminate potential conflicts between the statutes in contract matters.

Section 9(b) specifies that the Administrator shall carry out his functions in accordance with the Act, the Bonneville Project Act and the Department of Energy Organization Act.

Section 9(c) insures that, as under present law, all power sold outside the Pacific Northwest by BPA must be surplus to the needs within the Northwest and that the provisions of the Act of August 31, 1964 will apply to resources acquired by BPA and its customers.

Paragraph (1) lists eight specific actions of the Council and BPA that are deemed final for purposes of judicial review under 5 U.S.C. 701-706.

Paragraph (2) sets forth the scope of review of such actions with or without a hearing. In the case of rate-making, the substantial evidence rule will apply. The adjudication provisions of 5 U.S.C. 554 and 557 do not apply to hearings under this bill.

Paragraph (3) makes it clear that other final actions and decisions of the Council and BPA are also subject to judicial review in accordance with existing law.

Paragraph (5) indicates what courts will entertain judicial review and provides some finality to the plan and other actions.

Section 9(e), the so-called "tax-exempt financing provision", preserves, but does not extend the ability of publicly-owned utilities to finance power resources with governmental obligations, the income from which is exempt from Federal taxation as provided in section 103(a)(1) of the Internal Revenue Code. So long as these resources are developed to meet the firm load of public bodies, cooperatives and Federal agencies, acquisition of these resources by the Administrator does not impair the exemption. The subsection establishes a two-step procedure to insure that

the exemption is only available for this purpose and is exercised consistent with appropriate regulations. First, the Administrator must certify that the persons for whom the Administrator is acquiring such resources for sale pursuant to section 5 of this are public bodies, cooperatives and Federal agencies and this certification must be pursuant to methodology approved by the Secretary. Secondly, the Secretary must determine under regulations which apply to industrial development bonds that less than a major portion of the resource is to be furnished to persons who are not exempt persons (which term does not include cooperatives and Federal agencies).

Section 9(f) directs the Federal Energy Regulatory Commission to convene a joint State board to assist the Commission in its review of rates paid by the Administrator for power from investor-owned utilities. This insures that State regulatory bodies will be given an opportunity to participate in this review and does not establish any precedent in applying the Federal Power Act.

Currently, section 209 of the Federal Power Act authorizes such a board. This provision would mandate the board. However, it does not change FERC's remaining powers under section 209, including its power to revoke any reference to such a board.

Section 9(g) is intended to provide a limited exemption for the Public Utility Holding Company Act of 1935 by exempting from the definition of "electric utility company" in that Act any company which owns or operates facilities for the generation of electricity generated by such company to be sold directly or indirectly to the Administrator. At least ninety percent of such generation must be sold directly or indirectly to BPA. The Securities and Exchange Commission, with the concurrence of the Administrator, must determine that the organization of such company is consistent with the policies of section 1(b) of the Public Utility Holding Company Act of 1935 (PUHCA). Participation in any such facilities must be offered to public bodies and

cooperatives. The Administrator must include in contracts for the purchase of a major resource from that company provisions limiting the amount of equity, if any, in such company to that which the Administrator determines will be consistent with achieving the lowest attainable power cost. All significant contracts entered into by and between that company must be approved by BPA with the SEC's concurrence. These will include all sales, construction, financing and related contracts as a minimum. The exemption shall continue unless the Administrator or the Securities and Exchange Commission, or both through periodic review, determine that the company no longer operates in a manner consistent with the policy of the PUHCA. A procedure bringing the company into compliance is provided.

The Committee amendment requires the SEC to "determine that the organization is consistent with the policies of PUHCA" and contemplates that the SEC should establish procedures as it may deem appropriate to assure that such exemption is consistent with the policies of PUHCA. The amendment contemplates monitoring of the operation of the subsidiary. The SEC or the BPA Administrator may revoke the exemption upon a determination that it is no longer being operated in a manner consistent with the policies of PUHCA. The Committee amendment provides for periodic review by BPA and SEC of the exemption. The purpose of this provision is to ensure that the company is in compliance and, if it is not, to take appropriate action, including termination of the exemption. However, it is not intended that these agencies trigger termination procedure for minor or insignificant reasons. The agencies should give a company reasonable opportunity to make corrections after giving notice of them to the company. Also, the term "policies" of the 1935 Act is not defined by the Committee. The agencies are, obviously given some leeway to define them in light of the Act and its application today and in the future. The bill places a duty on both agencies. The Committee expects that it will be exercised properly and fairly, but with effect.

Lastly, in requiring that at least 90% of the power generated by the exempted company's share of a project be sold to BPA, the Committee understands that individual plant operations could cause an anticipated violation of this requirement and does not believe that an exemption should be lost under such circumstances, but the BPA and SEC should examine violations to see if they are, in fact, only minor in nature.

Section 9(h) describes the additional services that the Administrator is to provide his customers within the region. Paragraph (1) requires that the Administrator, upon the request of any customer, including the DSI's assist such customer in acquiring and disposing of non-Federal power that such customers need to replace power that may be curtailed or interrupted by the Administrator. Paragraph (2) authorizes the Administrator to prescribe policies and conditions for the independent acquisition or disposition of power by direct service industries. Paragraph (3) requires the Administrator to furnish services, including transmission, storage, and load factors, to customers unless he determines that the provisions of such services would interfere with his other responsibilities and provides a limited priority in this respect to resources under construction on the effective date of this Act is such power as has been offered for sale at cost and referred by the Administrator.

Section 9(i) requires the Council to prepare a report on retail rate structures that encourage cost-effective conservation and consumer-owned renewable resources, and to authorize the Administrator, upon request of a customer, to assist the customer in analyzing and developing retail structure that encourage such conservation and renewable resources.

Section 9(j) establishes a new position with BPA for conservation and renewable resources and requires that the Administrator, subject to his supervision, assign responsibility for conservation and renewable resource programs to

this person. The intent is to provide greater emphasis to these programs at BPA consistent with the bill's purposes.

SECTION 10. *Savings provision*

The Committee intends under section 10(a) that nothing in this Act shall be construed to modify the authorities and responsibilities of State and local governments and electric utilities over their traditional responsibilities for power matters, particularly siting of projects, rate regulations, safety and other areas within State jurisdiction. The disclaimer, however, does not relieve BPA customers and others with contractual obligations under this bill from complying with those obligations and this bill.

Section 10(b) preserves the rights and obligations of the Administrator and his customers under contracts existing on the effective date of this Act. Again this provision must be read in light of other provisions of the bill that provide for termination of contracts upon acceptance of initial contracts.

Section 10(c) makes it clear that this Act does not in any way affect or modify the preference provisions contained in other Federal power marketing statutes.

Section 10(d) was added by the Committee to insure that certain identified contracts entered into by the Administrator to sell power, to acquire or credit resources, or to reimburse investigation and preconstruction expenses, shall not be affected if any provision of this Act is found to be unconstitutional. The savings provision applies to contracts entered into prior to such finding and in accordance with the affected provision.

Section 10(e) was added by the Committee to insure that nothing in this Act shall be construed to modify any treaty or other right of an Indian tribe.

SECTION 11. *Effective date*

This section establishes the effective date of the bill to be the enactment date or October 1, 1980, whichever is later.

Appendix E

96TH CONGRESS HOUSE OF REPRESENTATIVES REPT. 96-976
2d Session Part II

Assisting the electrical consumers of the Pacific Northwest through use of the Federal Columbia River Power System to achieve cost-effective energy conservation, to encourage the development of renewable energy resources, to establish a representative regional power planning process, to assure the region of an efficient and adequate power supply, and for other purposes

SEPTEMBER 16, 1980. — Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. UDALL, from the Committee on Interior and Insular Affairs, submitted the following

REPORT

together with

SUPPLEMENTAL, ADDITIONAL,
SEPARATE, and DISSENTING VIEWS

[To accompany S. 885]

[Including the cost estimate of the Congressional
Budget Office]

The Committee on Interior and Insular Affairs, to whom was referred the bill (S. 885) to assist the electrical consumers of the Pacific Northwest through use of the Federal Columbia River Power System to achieve cost-effective energy conservation, to encourage the development of re-

newable energy resources, to establish a representative regional power planning process, to assure the region of an efficient and adequate power supply, and for other purposes, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

The amendment is as follows:

Page 1, line 3, strike all after the enacting clause and insert the following:

SHORT TITLE AND TABLE OF CONTENTS

SECTION 1. This Act, together with the following table of contents, may be cited as the "Pacific Northwest Electric Power Planning and Conservation Act".

TABLE OF CONTENTS

- Section 1. Short title and table of contents.
- Section 2. Purposes.
- Section 3. Definitions.
- Section 4. Regional planning and participation.
- Section 5. Sale of power.
- Section 6. Conservation and resource acquisition.
- Section 7. Rates.
- Section 8. Amendments to existing law.
- Section 9. Administrative provisions.
- Section 10. Savings provision.
- Section 11. Effective Date.

PURPOSES

SECTION 2. The purposes of this Act, all of which are to be consistent with applicable provisions of environmental and other laws, are —

(1) to encourage, through the unique opportunity provided by the Federal Columbia River Power System, conservation and efficiency in the use of electric power and the development of renewable resources within the Pacific Northwest;

(2) to assure the Pacific Northwest an adequate, efficient, economical, and reliable power supply;

(3) to provide for the participation and consultation of the Pacific Northwest States, local governments,

consumers, customers, users of the Columbia River System (including Federal and State fish and wildlife agencies and appropriate Indian tribes), and the public at large within the region in the development of regional plans and programs related to energy conservation, renewable resources, other resources, and in achieving the purposes of this Act to facilitate the orderly planning of the region's power system, to provide environmental quality, and to protect, mitigate, and enhance the fish and wildlife resources;

(4) to provide that the customers of the Bonneville Power Administration and their consumers continue to pay all costs necessary to produce, transmit, and conserve resources to meet the region's electric power requirements, including the amortization of the Federal investment in the Federal Columbia River Power System;

(5) to insure, subject to the provisions of this Act —

(A) that the authorities and responsibilities of State and local governments, electric utility systems, water management agencies, and other non-Federal entities for the regulation, planning, conservation, supply, distribution, and use of electric power shall be construed to be maintained, and

(B) that Congress intends that this Act not be construed to limit or restrict the ability of customers to take actions in accordance with other applicable provisions of Federal or State law, including, but not limited to, actions to plan, develop, and operate resources and to achieve conservation, without regard to this Act; and

(6) to protect, mitigate, and enhance the fish and wildlife, including related spawning grounds and habitat, of the Columbia River and its tributaries, particularly anadromous fish which are of significant im-

portance to the social and economic well-being of the Pacific Northwest and the Nation and which are dependent on suitable environmental conditions substantially obtainable from the management and operation of the Federal Columbia River Power System and other facilities on the Columbia River and its tributaries.

DEFINITIONS

SECTION 3. As used in this Act, the term —

(1) "Acquire" and "acquisition" shall not be construed as authorizing the Administrator to construct, or have ownership of, under this Act or any other law, any electric generating facility.

(2) "Administrator" means the Administrator of the Bonneville Power Administration.

(3) "Conservation" means any reduction in electric power consumption as a result of increases in the efficiency of energy use, production, or distribution.

(4)(A) "Cost-effective", when applied to any measure or resource referred to in this Act, means that such measure or resource must be forecast —

(i) to be reliable and available within the time it is needed, and

(ii) to meet or reduce the electric power demand, as determined by the Council or the Administrator, as appropriate, of the consumers of the customers at an estimated incremental system cost no greater than that of the least-cost similarly reliable and available alternative measure or resource, or any combination thereof.

(B) For purposes of this paragraph, the term "system cost" means an estimate of all direct costs of a measure or resource over its effective life, including,

if applicable, the cost of distribution and transmission to the consumer and, among other factors, waste disposal costs, end-of-cycle costs, decommissioning costs, and fuel costs (including projected increases), and such quantifiable environmental costs and benefits as the Administrator determines, on the basis of a methodology developed by the Council as part of the plan, or in the absence of the plan by the Administrator, are directly attributable to such measure or resource.

(C) In determining the amount of power that a conservation measure or other resource may be expected to save or to produce, the Council or the Administrator, as the case may be, shall take into account projected realization factors and plant factors, including appropriate historical experience with similar measures or resources.

(D) For purposes of this paragraph, the "estimated incremental system cost" of any conservation measure or resource shall not be treated as greater than that of any nonconservation measure or resource unless the incremental system cost of such conservation measure or resource is in excess of 110 per centum of the incremental system cost of the nonconservation measure or resource.

(5) "Consumer" means any end user of electric power.

(6) "Council" means, unless otherwise specifically provided, the members appointed to the Pacific Northwest Electric Power and Conservation Planning Council established by this Act.

(7) "Customer" means anyone who contracts for the purchase of power from the Administrator pursuant to this Act.

(8) "Direct service industrial customer" means an industrial customer that contracts for the purchase of power from the Administrator for direct consumption.

(9) "Electric power" mean electric peaking capacity, or electric energy, or both.

(10) "Federal base system resources" means —

(A) the Federal Columbia River Power System hydroelectric projects;

(B) resources acquired by the Administrator under long-term contracts in force on the effective date of this Act; and

(C) resources acquired by the Administrator in an amount necessary to replace reductions in capability of the resources referred to in subparagraphs (A) and (B).

(11) "Indian tribe" means any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior.

(12) "Major resource" means any resource that—

(A) has a planned capability greater than fifty average megawatts, and

(B) if acquired by the Administrator, is acquired for a period of more than five years but does not mean any resource acquired pursuant to section 11(b)(6) of the Federal Columbia River Transmission System Act.

(13) "New large single load" means any load associated with a new facility, an existing facility, or an expansion of an existing facility—

(A) which is not contracted for, or committed to, as determined by the Administrator, by a public body, cooperative, investor-owned utility, or Federal agency customer, as applicable prior to September 1, 1979, and

(B) which will result in an increase in power requirements of ten average megawatts or more in any consecutive twelve-month period.

(14) "Pacific Northwest", "region", or "regional" means—

(A) the area consisting of the States of Oregon, Washington, and Idaho, the portion of the State of Montana west of the Continental Divide, and such portions of the States of Nevada, Utah, and Wyoming as are within the Columbia River drainage basin; and

(B) any contiguous areas, not in excess of seventy-five air miles from the area referred to in subparagraph (A), which are a part of the service area of a rural electric cooperative customer served by the Administrator on the effective date of this Act which has a distribution system from which it serves both within and without such region.

(15) "Plan" means the Regional Electric Power and Conservation plan adopted pursuant to this Act and such plan shall apply to actions of the Administrator as specified in this Act.

(16) "Renewable resource" means a resource which utilizes solar, wind, hydro, geothermal, biomass, or similar sources of energy and which either is used for electric power generation or will reduce the electric power requirements of a consumer, including by direct application.

(17) "Reserves" means the electric power needed to avert particular planning or operating shortages for the benefit of firm power customers of the Administrator and available to the Administrator —

(A) from resources, or

(B) from rights to interrupt, curtail, or otherwise withdraw, as provided by specific contract provisions, portions of the electric power supplied to customers.

(18) "Residential use" or "residential load" means all usual residential, apartment, seasonal dwelling and farm electric loads or uses, but only the first four hundred horsepower during any monthly billing period of farm irrigation and pumping for any farm.

(19) "Resource" means—

(A) electric power, including the actual or planned electric power capability of generating facilities, or

(B) actual or planned load reduction resulting from direct application of a renewable energy resource by a consumer, or from a conservation measure.

(20) "Secretary" means the Secretary of Energy.

REGIONAL PLANNING AND PARTICIPATION

SECTION 4. (a)(1) To facilitate cooperation among the States of Idaho, Montana, Oregon, and Washington, and the United States pursuant to this Act, there is established the Pacific Northwest Electric Power and Conservation Planning Council, which shall have its offices in the Pacific Northwest. The Council shall be composed of eight members, and shall be considered formed when at least six members have been appointed.

(2) The Governors of Idaho, Montana, Oregon, and Washington may appoint, subject to applicable State law, two members from their respective States to carry out the functions of Council members set forth in this Act. The applicable State authorities and appointing actions of the States shall constitute an agreement to the exercise by the Council of the functions set forth in this Act, to which the Congress hereby consents.

(3) Members of the Council appointed pursuant to section 4(a)(2) shall—

(A) serve until June 30 of the third twelve-month period following the date of their appointment, unless otherwise provided by State law;

(B) be subject to removal in accordance with the provisions of State law;

(C) be compensated according to such State law from funds available pursuant to paragraph (14); and

(D) be deemed to be officers or employees of their respective States, and not of the United States.

(4)(A) If the Governors have not appointed at least six Council members by April 30, 1981, or if, for any other reason the Council set forth in paragraph (2) is unable to be formed or is held by a United States court of appeals to be unable to perform substantially all of its functions, the Secretary shall temporarily appoint two members from each of the States of Washington, Oregon, Idaho, and Montana to serve on an interim basis until such time as Congress or the States act to cure any impediment to the appointment of Council members pursuant to paragraph (2). Any appointments by the Secretary under this paragraph shall be made in a manner designed to assure continuity of the Council's functions and to minimize any possible disruption of the Council's activities during such interim period. Unless extended by the Congress, the interim Council appointed pursuant to this paragraph shall terminate at the end of the second full Congress following the first temporary appointment.

(B) Within one year after making any such temporary appointment pursuant to this paragraph, the Secretary, in consultation with the Governors of the Pacific Northwest States, shall formally submit to the appropriate committees of Congress recommended legislation that will permit members to be appointed by the Governors in the manner set forth in paragraph (2). The Secretary shall make quarterly reports to the Governors on the progress of such legislation until its enactment and to Congress as to whether the

interim Council should be extended or any other recommendations for legislation or other action which the Secretary recommends should be taken, following termination of the Council, to continue carrying out the purposes for which the Council was established.

(C) If members are appointed by the Secretary on an interim basis pursuant to this paragraph, they shall (i) receive compensation under the General Schedule at a rate equivalent to the salary of members appointed from the same State by the Governor pursuant to paragraph (2); (ii) be considered during their temporary appointments, officers or employees of the United States for purposes of title II of the Ethics in Government Act of 1978 (5 U.S.C. app.); and (iii) be allowed travel expenses, including per diem in lieu of subsistence expenses, in addition to the compensation provided in this paragraph.

(D) In the event the Congress fails to extend the interim Council or enact legislation to cure any impediment to the appointment of Council members pursuant to paragraph (2), the Administrator may not implement any proposal to acquire a major generating resource or to grant billing credits or services involving a major generating resource until the expenditure of funds for that purpose has been specifically approved by Act of Congress.

(5) A majority of the members of the Council shall constitute a quorum. Except as otherwise provided specifically in this Act, all actions and decisions of the Council shall be by majority vote of the voting members present and voting. The plan or any part thereof and any amendment thereto shall not be approved unless such plan or amendment receives the votes of (A) a majority of the members appointed to the Council, including the vote of at least one member from each State; or (B) at least six members of the Council.

(6) The members of the Council shall select from among themselves a Chairman for the Council. The Council shall

meet at the call of the Chairman or upon the request of a majority of the members of the Council. If any member of the Council disagrees with respect to any matter transmitted to any Federal or State official or any other person or wishes to express additional views concerning such matter, such member may submit a statement to accompany such matter setting forth the reasons for such disagreement or views.

(7) The Council shall appoint, and may assign and delegate duties to such executive and administrative personnel as the Council deems necessary to fulfill its functions under this Act, taking into account such information and analyses as are, or are likely to be, available from other sources pursuant to provisions of this Act. No person appointed by the Council shall be deemed to be an employee of the United States.

(8) Upon request of the Council, the head of any Federal agency is authorized to detail to the Council, on a reimbursable basis, any of the personnel of such agency to assist the Council in the performance of its functions under this Act.

(9) To obtain such information and advice as the Council determines to be necessary or appropriate to carry out the purposes of this Act, the Council shall, to the greatest extent practicable, solicit engineering, economic, social, environmental, and other technical studies from customers of the Administrator and from other bodies or organizations in the region with particular expertise.

(10) The Council shall determine its organization and prescribe its practices and procedures for carrying out its functions under this Act. The Council shall make available to the public a statement of its organization, practices, and procedures, and make available to the public its annual work program budget at the time the President submits his annual budget to Congress.

(11) The Administrator and other Federal agencies, to the extent authorized by other provisions of law, shall fur-

nish the Council all information requested by the Council as necessary for performance of its functions, subject to such requirements of law concerning trade secrets and proprietary data as may be applicable.

12(A) At the request of the Council, the Administrator shall pay from funds available to the Administrator the compensation and other expenses of the Council as are authorized by this Act and as the Council determines are necessary or appropriate for the performance of its functions including financial support to those States which have appointed members to the Council pursuant to section 4(a)(2) for their participation in the Council and activities of the State related thereto. Funds for such payments shall be included by the Administrator in his annual budgets submitted to Congress pursuant to the Federal Columbia River Transmission System Act and shall be subject to the requirements of that Act, including the audit requirements of section 11(d). Such funds shall not exceed annually an amount equal to 0.02 mill multiplied by the kilowatt hours sold by the Administrator during the preceding calendar year. In order to assist the Council's initial organization, the Administrator after the enactment of this Act shall promptly prepare and propose an amended annual budget to expedite payment for Council activities.

(B) Notwithstanding the limitation contained in the third sentence of subparagraph (A), upon an annual showing by the Council that such limitation will not permit the Council to carry out its functions under this Act, the Administrator may raise such limit up to any amount not in excess of 0.10 mill multiplied by the kilowatt hours sold by the Administrator during the preceding calendar year.

(b)(1) The Council shall, subject to applicable law, establish a voluntary scientific and statistical advisory committee to assist in the development, collection, and evaluation of such statistical, biological, economic, social, environmental, and other scientific information as is

relevant to the Council's development and amendment of a regional conservation and electric power plan.

(2) The Council may, subject to applicable law, establish such other voluntary advisory committees as it determines are necessary or appropriate to assist it in carrying out its functions under this Act.

(c) The Council shall ensure that the membership of any advisory committee established or formed pursuant to subsection (b) of this section shall, to the greatest extent feasible, be composed of representatives of, and seek the advice of, the various Federal, State, and Indian Tribal Governments, consumer groups, and customers whose interests are or may be directly or indirectly substantially affected by the recommendations of such advisory committees.

(d) Within two years after the effective date of this Act, the Council shall prepare, adopt, and promptly transmit to the Administrator a regional conservation and electric power plan. The adopted plan, or any portion thereof, may be amended from time to time, and shall be reviewed by the Council not less frequently than once every five years. Prior to such adoption, public hearings shall be held in each Council member's State on the plan or substantial, non-technical amendments to the plan proposed by the Council for adoption. A public hearing shall also be held in any other State of the region on the plan or amendments thereto, if the Council determines that the plan or amendments would likely have a substantial impact on that State in terms of major resources which may be developed in that State and which the Administrator may seek to acquire. Action of the Council under this subsection concerning such hearings shall be subject to section 553 of title 5, United States Code and such procedures as the Council shall adopt.

(e)(1) The plan shall, as provided in this paragraph, give priority to resources which the Council determines to be cost effective. Priority shall be given; first, to con-

servation; second, to renewable resources; third, to generating resources utilizing waste heat or generating resources of high fuel conversion efficiency; and fourth, to all other resources.

(2) The plan shall set forth a general scheme for implementing conservation measures and developing resources pursuant to section 6 of this Act to reduce or meet the Administrator's obligations with due consideration by the Council of (A) environmental quality, (B) compatibility with the existing regional power system, (C) protection, mitigation, and enhancement of fish and wildlife and related spawning grounds and habitat including sufficient quantities and qualities of flows for successful migration, survival, and propagation of anadromous fish, and (D) other criteria which may be set forth in the plan.

(3) To accomplish the priorities established by this subsection, the plan shall include the following elements which shall be set forth in such detail as the Council determines to be appropriate:

(A) an energy conservation program to be implemented under this Act including, but not limited to, model conservation standards;

(B) recommendations for research and development;

(C) a methodology for determining quantifiable environmental costs and benefits under section 3(4);

(D) a demand forecast of at least twenty years (developed in consultation with the Administrator, the customers, the States, including State agencies with ratemaking authority over electric utilities, and the public, in such manner as the Council deems appropriate) and a forecast of power resources estimated by the Council to be required to meet the Administrator's obligations and the portion of such obligations the Council determines can be met by resources in each of

the priority categories referred to in paragraph (1) which forecast (i) shall include regional reliability and reserve requirements, (ii) shall take into account the effect of the requirements of subsection (h) on the availability of resources to the Administrator, and (iii) shall include the approximate amounts of power the Council recommends should be acquired by the Administrator on a long-term basis and the types of resources from which such power should be acquired;

(E) an analysis of reserve and reliability requirements and cost-effective methods of providing reserves designed to insure adequate electric power at the lowest probable cost;

(F) the program adopted pursuant to subsection (h); and

(G) if the Council recommends surcharges pursuant to subsection (f), a methodology for calculating such surcharges.

(4) The Council shall undertake studies of conservation measures reasonably available to direct service industrial customers and other major consumers of electric power within the region and make an analysis of the estimated reduction in energy use which would result from the implementation of such measures as rapidly as possible, consistent with sound business practices. The Council shall include in such study and analysis estimates of financial assistance to the extent such assistance might be necessary for particular conservation measures to be implemented.

(f)(1) Model conservation standards to be included in the plan shall include, but not be limited to, standards applicable to (A) new and existing structures, (B) utility, customer, and governmental conservation programs, and (C) other consumer actions for achieving conservation. Model conservation standards shall reflect geographic and

climatic differences within the region and other appropriate considerations, and shall be designed to produce all power savings that are cost-effective for the region and economically feasible for consumers through financial assistance made available to consumers under section 6(a) of this Act. These model conservation standards shall be adopted by the Council and included in the plan after consultation, in such manner as the Council deems appropriate, with the Administrator, States, and political subdivisions, customers of the Administrator, and the public.

(2) The Council by a majority vote of the members of the Council is authorized to recommend to the Administrator a surcharge and the Administrator shall thereafter impose such a surcharge, in accordance with the methodology provided in the plan, on customers for those portions of their loads within the region that are within States or political subdivisions which have not, or on the Administrator's customers which have not, implemented conservation measures applicable to such customers that achieve energy savings which the Administrator determines are comparable to those which would be obtained under such standards. Such surcharges shall be established to recover such additional costs as the Administrator determines will be incurred because such projected energy savings attributable such conservation measures have not been achieved, but in no case may such surcharges be less than 10 per centum or more than 50 per centum of the Administrator's applicable rates for such load or portion thereof.

(g) To insure widespread public involvement in the formulation of regional power policies, the Council and Administrator shall —

(1) take into account, and give due consideration to, the results of the voting in any election bearing on those policies held in those States, or subdivisions thereof, which comprise the region, as defined in section 3(14), and

(2) maintain comprehensive programs to —

(A) inform the Pacific Northwest public of major regional power issues,

(B) obtain public views concerning major regional power issues, and

(C) secure advice and consultation from the Administrator's customers and others.

(h)(1)(A) The Council shall develop and adopt, pursuant to this subsection, a program to protect, mitigate, and enhance fish and wildlife, including habitat, on the Columbia River and its tributaries. Because of the unique history problems and opportunities presented by the development and operation of the hydroelectric facilities on the Columbia River and its tributaries, the program shall be designed to deal with that river and its tributaries as a system. As a result, this subsection shall be applicable solely to fish and wildlife, including habitat, located on the Columbia River and its tributaries. Nothing in this subsection shall alter, modify or affect in any way the laws applicable to other rivers, river systems, or electric power facilities, or affect the rights and obligations of any agency, entity, or person under such laws.

(B) The Council shall request in writing promptly after the effective date of this Act and prior to the development or review of the plan, or any major revision thereto, from the Federal and the region's State fish and wildlife agencies and the region's appropriate Indian tribes, recommendations for —

(i) measures which the Administrator, using authorities under this Act and other laws and other Federal agencies can implement to protect, mitigate, and enhance fish and wildlife, including related spawning grounds and habitat, affected by the development and operation of any hydroelectric project of the Columbia River and its tributaries;

(ii) objectives for the development and operation of projects of the Columbia River and its tributaries in

a manner designed to protect, mitigate, and enhance fish and wildlife, and

(iii) fish and wildlife management coordination and research and development (including funding) which, among other things, will assist protection, mitigation and enhancement of anadromous fish at and between the region's hydroelectric dams.

(C)(i) Agencies and tribes shall have ninety days to respond to such request, unless the Council extends the time for making such recommendations. The Federal and the region's water management agencies, and the region's electric power producing agencies, customers and public may submit recommendations of the type referred to in subparagraph (1)(B), and comments on the recommendations submitted by agencies and tribes, within such reasonable time as the Council shall provide. All recommendations shall be accompanied by detailed information and data in support of the recommendations.

(ii) The Council shall give notice of all recommendations and shall make recommendations and supporting documents available to the Administrator, to the Federal and the region's State fish and wildlife agencies, to the appropriate Indian tribes, to Federal agencies responsible for managing, operating or regulating hydroelectric facilities located on the Columbia River or its tributaries, and to any customer or other electric utility which owns or operates any such facility. Upon request, notice shall also be given to members of the public, and copies of recommendations and supporting documents shall be made available at reasonable cost. The Council shall provide opportunities for public participation and comment regarding the recommendations and supporting documents by conducting hearings or by other appropriate means.

(iii) Thereafter, the Council shall develop a program on the basis of recommendations, supporting documents, and relevant additional views and information. The program shall consist of measures to protect, mitigate and enhance

fish and wildlife affected by the development or operation of such facilities while assuring the Pacific Northwest an adequate, efficient, economical, and reliable power supply. Enhancement measures shall be included in the program to the extent they satisfy the criteria of this subsection and are designed to achieve protection and mitigation.

(iv) Measures included in the program shall —

(1) complement the existing and future activities of the Federal and the region's State fish and wildlife agencies and appropriate Indian tribes;

(2) be based on and supported by the best available scientific knowledge;

(3) achieve sound biological objectives at minimum economic cost for each objective;

(4) be consistent with the legal rights of appropriate Indian tribes in the region;

and, in the case of anadromous fish;

(5) provide for improved survival of such fish at hydroelectric facilities located on the Columbia River system; and

(6) provide flows of sufficient quality and quantity between such facilities to improve production, mitigation and survival of such fish as necessary to meet sound biological objectives.

(v) The Council shall determine whether each recommendation received is consistent with the purposes of this Act. In the event such recommendations are inconsistent with each other, the Council, in consultation with appropriate entities, shall resolve such inconsistency in the program giving due weight to the recommendations, expertise, and legal rights and responsibilities of the Federal and the region's State fish and wildlife agencies and appropriate Indian tribes. If the Council does not adopt any recommendation as part of the program, it shall explain in writ-

ing, as part of the program, the basis for its finding that the adoption of such recommendation would be —

(1) inconsistent with the purposes of the Act;

(2) inconsistent with the standards for the program established in this paragraph; or

(3) less effective than the adopted recommendations for the protection, mitigation, and enhancement of fish and wildlife.

(vi) The Council shall recognize, in developing and adopting a program pursuant to this subsection, the following additional principles:

(1) enhancement measures may be used, in appropriate circumstances, as a means of achieving offsite protection and mitigation with respect to compensation for losses arising from the development and operation of the hydroelectric facilities of the Columbia River and its tributaries as a system,

(2) consumers of electric power shall bear the cost of measures designed to deal with adverse impacts caused by the development and operation of electric power facilities and programs only,

(3) monetary costs and electric power losses resulting from the implementation of the program shall be allocated by the Administrator consistent with individual project impacts and system-wide objectives pursuant to paragraph (2) of this subsection, and

(4) to the extent the program provides for coordination of its measures with additional measures (including additional enhancement measures and measures to deal with impacts caused by factors other than the development and operation of electric power facilities and programs), such additional measures are to be implemented in accordance with agreements among the

appropriate parties providing for the administration and funding of such additional measures.

(vii) The Council shall adopt such program within one year of the time provided for receipt of the recommendations in section 4(h)(1)(B). Such program shall also be included in the plan adopted by the Council under subsection (d). The Council's actions pursuant to this paragraph shall be subject to judicial review under the provisions of section 9(e).

(2)(A) The Administrator shall use the Bonneville Power Administration fund and appropriations, if any, and the authorities available to the Administrator under this Act and other laws administered by the Administrator, to protect, mitigate, and enhance the fish and wildlife to the extent affected by the development and operation of any hydroelectric project of the Columbia River and its tributaries in a manner consistent with the plan, the program adopted by the Council under section 4(h)(1), the purposes of this Act, and the provisions of other laws. Expenditures of the Administrator pursuant to this paragraph shall be in addition to, not in lieu of, other expenditures authorized or required from other entities under other agreements or provisions of law.

(B) The Administrator may make expenditures from such fund for such purposes which shall have been included in the annual or supplementary budgets submitted to the Congress pursuant to the Federal Columbia River Transmission System Act. Any amounts included in such budget for the construction of capital facilities with an estimated life of greater than five years or an aggregate capital cost of over \$1 million shall be funded as provided in the appropriation Acts from the proceeds of bonds issued by the Administrator pursuant to section 13 of the Federal Columbia River Transmission System Act or from appropriations, including appropriations to other Federal agencies for such purposes.

(C) The amounts expended by the Administrator for each activity pursuant to this subsection shall be allocated as appropriate by the Administrator, in consultation with the Corps of Engineers and the Water and Power Resources Service, among the various hydroelectric projects of the Federal Columbia River Power System. Amounts so allocated shall be further allocated to the various project purposes in accordance with existing accounting procedures for the Federal Columbia River Power System.

(3)(A) The Administrator and other Federal agencies responsible for managing, operating, or regulating Federal or non-Federal hydroelectric facilities located on the Columbia River or its tributaries shall —

(i) exercise such responsibilities in coordination with one another, consistent with the purposes of this Act and other applicable laws, to adequately protect, mitigate, and enhance fish and wildlife, including related spawning grounds and habitat, affected by such projects or facilities in a manner that provides equitable treatment for such fish and wildlife with the other purposes for which such system and facilities are managed and operated under other provisions of law;

(ii) exercise such responsibilities, taking into account at each relevant stage of decisionmaking processes to the fullest extent practicable, the program adopted by the Council under paragraph (1).

If, and to the extent that, such other Federal agencies as a result of such consideration impose upon any non-Federal electric power project measures to protect, mitigate and enhance fish and wildlife which are not attributable to the development and operation of such project, then the resulting monetary costs and power losses (if any) shall be borne by the Administrator in accordance with paragraph (2) of this subsection.

(B) The Administrator and such Federal agencies shall consult with the Secretary of the Interior, the Assistant

Administrator for the National Marine Fisheries Service, and the State fish and wildlife agencies of the region, appropriate Indian tribes and affected project operators in carrying out the provisions of this paragraph.

(4) Beginning on October 1 of the first fiscal year after all members to the Council are appointed initially, the Council shall submit annually a detailed report to the Committee on Energy and Natural Resources of the Senate and to the Committees on Interstate and Foreign Commerce and on Interior and Insular Affairs of the House of Representatives. The report shall describe the actions taken and to be taken by the Council under this section including this subsection, the effectiveness of the fish and wildlife program, and potential revisions or modifications to the program to be included in the plan. At least ninety days prior to its submission of such report, the Council shall make available to such fish and wildlife agencies, and tribes, the Administrator and the customers a draft of such report. The Council shall establish procedures for timely comments thereon. The Council shall include as an appendix to such report such comments or a summary thereof. The Administrator shall keep such committees fully and currently informed of the actions taken and to be taken by the Administrator under this Act, including this subsection.

(5) If, after one year from the effective date of this Act, the Council is unable to be formed or to perform its functions under the provisions of this subsection, the Administrator shall, upon request of the region's State and Federal fish and wildlife agencies or appropriate Indian tribes, carry out the development of a program in accordance with the provisions of this subsection, until such time as the Council is formed or the Administrator determines it is able to perform its functions.

(i) In carrying out the provisions of this section, the Council and the Administrator shall—

- (1) consult with the Administrator's customers;
- (2) include the comments of such customers in the record of the Council's proceedings; and

(3) recognize and not abridge the authorities of State and local governments, electric utility systems, and other non-Federal entities responsible to the people of the Pacific Northwest for the planning, conservation, supply, distribution, and use of electric power and the operation of electric generating facilities.

(j) In the preparation, adoption, and implementation of the plan, the Council and the Administrator shall encourage the cooperation, participation, and assistance of appropriate Federal agencies, State entities, State political subdivisions, and Indian tribes. The Council and the Administrator are authorized to contract, in accordance with applicable law, with such agencies, entities, tribes, and subdivisions individually, in groups, or through associations thereof to (1) investigate possible measures to be included in the plan, (2) provide public involvement and information regarding a proposed plan or amendment thereto, and (3) provide services which will assist in the implementation of the plan. In order to assist in the implementation of the plan, particularly conservation, renewable resource, and fish and wildlife activities, the Administrator, when requested and subject to available funds, may provide technical assistance in establishing conservation, renewable resource, and fish and wildlife objectives by individual States or subdivisions thereof or Indian tribes. Such objectives, if adopted by a State or subdivision thereof or Indian tribes, may be submitted to the Council and the Administrator for review, and upon approval by the Council may be incorporated as part of the plan.

SALE OF POWER

SECTION 5. (a) All power sales under this Act shall be subject at all times to the preference and priority provisions of the Bonneville Project Act of 1937 (16 U.S.C. 832 and following) and, in particular, sections 4 and 5 thereof.

Such sales shall be at rates established pursuant to section 7.

(b)(1) Whenever requested, the Administrator shall offer to sell to each requesting public body and cooperative entitled to preference and priority under the Bonneville Project Act of 1937 and to each requesting investor-owned utility electric power to meet the firm power load of such public body, cooperative or investor-owned utility in the region to the extent that such firm power load exceeds—

(A) the capability of such entity's firm peaking and energy resources used in the year prior to the enactment of this Act to serve its firm load in the region, and

(B) such other resources as such entity determines, pursuant to contracts under this Act, will be used to serve its firm load in the region.

In determining the resources which are used to serve a firm load, for purposes of subparagraphs (A) and (B), any resources used to serve a firm load under such subparagraphs shall be treated as continuing to be so used, unless such use is discontinued with the consent of the Administrator, or unless such use is discontinued because of obsolescence, retirement, loss of resource, or loss of contract rights.

(2) Contracts with investor-owned utilities shall provide that the Administrator may reduce his obligations under such contracts in accordance with section 5(a) of the Bonneville Project Act of 1937.

(3) In addition to his authorities to sell electric power under paragraph (1), the Administrator is also authorized to sell electric power to Federal agencies in the region.

(4) Sales under this subsection shall be made only if the public body, cooperative, Federal agency or investor-owned utility complies with the Administrator's standards for service in effect on the effective date of this Act or as subsequently revised.

(5) The Administrator shall include in contracts executed in accordance with this subsection provisions that enable the Administrator to restrict his contractual obligations to meet the loads referred to in this subsection in the future if the Administrator determines, after a reasonable period of experience under this Act, that the Administrator cannot be assured on a planning basis of acquiring sufficient resources to meet such loads during a specified period of insufficiency. Any such contract with a public body, cooperative, or Federal agency shall specify a reasonable minimum period between a notice of restriction and the earliest date such restriction may be imposed.

(6) Contracts executed in accordance with this subsection with public body, cooperative, and Federal agency customers shall —

(A) provide that the restriction referred to in paragraph (5) shall not be applicable to any such customers until the operating year in which the total of such customers' firm loads to be served by the Administrator equals or exceeds the firm capability of the Federal base system resources;

(B) not permit restrictions which would reduce the total contractual entitlement of such customers to an amount less than the firm capability of the Federal base system resources; and

(C) contain a formula for determining annually, on a uniform basis, each such customer's contractual entitlement to firm power during such a period of restriction, which formula shall not consider customer resources other than those the customer has determined, as of the effective date of this Act, to be used to serve its own firm loads.

The formula referred to in subparagraph (C) shall obligate the Administrator to provide on an annual basis only firm power needed to serve the portion of such customer's firm load in excess of the capability of such customer's own firm

resources determined by such customer under paragraph (1) to be used to serve its firm load.

(c)(1) Whenever a Pacific Northwest electric utility offers to sell electric power to the Administrator at the average system cost of that utility's resources in each year, the Administrator shall acquire by purchase such power and shall offer, in exchange, to sell an equivalent amount of electric power to such utility for resale to that utility's residential users within the region.

(2) The purchase and exchange sale referred to in paragraph (1) with any electric utility shall be limited to an amount not in excess of 50 per centum of such utility's regional residential load in the year beginning July 1, 1980, such 50 per centum limit increasing in equal annual increments to 100 per centum of such load in the year beginning July 1, 1985, and each year thereafter.

(3) The cost benefits, as specified in contracts with the Administrator, of any purchase and exchange sale referred to in paragraph (1) which are attributable to any electric utility's residential load within a State shall be passed through directly to such utility's residential loads within such State, except that a State which lies partially within and partially without the region may require that such cost benefits be distributed among all of the utility's residential loads in that State.

(4) An electric utility may terminate, upon reasonable terms and conditions agreed to by the Administrator and such utility prior to such termination, its purchase and sale under this subsection if the supplemental rate charge provided for in section 7(b)(3) is applied and the cost of electric power sold to such utility under this subsection exceeds, after application of such rate charge, the average system cost of power sold by such utility to the Administrator under this subsection.

(5) Subject to the provisions of sections 4 and 6, in lieu of purchasing any amount of electric power offered by a

utility under paragraph (1), the Administrator may acquire an equivalent amount of electric power from other sources to replace power sold to such utility as part of an exchange sale if the cost of such acquisition is less than the cost of purchasing the electric power offered by such utility.

(6) Exchange sales to a utility pursuant to this subsection shall not be restricted below the amounts of electric power acquired by the Administrator from, or on behalf of, such utility pursuant to this subsection.

(7) The "average system cost" for electric power sold to the Administrator under this subsection shall be determined by the Administrator on the basis of a methodology developed for this purpose in consultation with the Council, the Administrator's customers, and appropriate State regulatory bodies in the region. Such methodology shall be subject to review and approval by the Federal Energy Regulatory Commission. Such average system cost shall not include —

(A) the cost of additional resources in an amount sufficient to serve any new large single load of the utility;

(B) the cost of additional resources in an amount sufficient to meet any additional load outside the region occurring after the effective date of this Act; and

(C) any costs of any generating facility which is terminated prior to initial commercial operation.

(d)(1)(A) The Administrator is authorized to sell in accordance with this subsection electric power to existing direct service industrial customers. Such sales shall provide a portion of the Administrator's reserves for firm power loads within the region.

(B) After the effective date of this Act, the Administrator shall offer in accordance with subsection (g) to each existing direct service industrial customer an initial long-term contract that provides such customer an amount of power equivalent to that to which such customer is entitled

under its contract dated January or April 1975 providing for the sale of "industrial firm power".

(2) The Administrator shall not sell electric power, including reserves, directly to new direct service industrial customers.

(3) The Administrator shall not sell amounts of electric power, including reserves, to existing direct service industrial customers in excess of the amount permitted under paragraph (1) unless the Administrator determines that such proposed sale is consistent with the plan and that —

(A) additional power system reserves are required for the region's firm loads,

(B) the proposed sale would provide a cost-effective method of supplying such reserves,

(C) such loads or loads of similar character cannot provide equivalent operating or planning benefits to the region if served by an electric utility under contractual arrangements providing reserves, and

(D) the Administrator has or can acquire sufficient electric power to serve such loads, and

unless the Council has approved such sale by majority vote. After such determination and approval, the Administrator is authorized to offer to existing direct service industrial customers power in such amounts in excess of the amount permitted under paragraph (1) as the Administrator determines to be necessary to provide additional power system reserves to meet the region's firm loads.

(4)(A) As used in this section, the term "existing direct service industrial customer" means any direct service industrial customer of the Administrator which has a contract for the purchase of electric power from the Administrator on the effective date of this Act and which has before such effective date received electric power from the Administrator pursuant to such contract.

(B) The term "new direct service industrial customer" means any industrial entity other than an existing direct service industrial customer.

(e)(1) The contractual entitlement to firm power of any customer from whom, or on whose behalf, the Administrator has acquired electric power pursuant to section 6 may not be restricted below the amount of electric power so acquired from, or on behalf of, such customer. If in any year such customer's requirements are less than such entitlement, any excess of such entitlement shall be first made available to increase the entitlement of other customers of the same class before being available for the entitlement of other customers. For purposes of this paragraph, the following entities shall each constitute a class:

- (A) public bodies and cooperatives;
- (B) Federal agencies;
- (C) direct service industrial; and
- (D) investor-owned utilities.

(2) Any contractual entitlement to firm power which is based on electric power acquired from, or on behalf of, a customer pursuant to section 6 shall be in addition to any other contractual entitlement to firm power not subject to restriction that such customer may have under this section. For the purposes of this subsection, references to amounts of power acquired by the Administrator pursuant to section 6 shall be deemed to mean the amounts specified in the resource acquisition contracts exclusive of any amounts recognized in such contracts as replacement for Federal base system resources.

(3) The Administrator shall, consistent with the provisions of this Act, insure that any restrictions upon any particular customer class made pursuant to this subsection and subsection (b) are distributed equitably throughout the region.

(f) The Administrator is authorized to sell, or otherwise dispose of, electric power, including power acquired pursuant to this and other Acts, that is surplus to his obligations incurred pursuant to subsection (b), (c) and (d) of this section in accordance with this and other Acts applicable to the Administrator, including the Bonneville Project Act of 1937 (16 U.S.C. 832 and following), the Federal Columbia River Transmission System Act (16 U.S.C. 838 and following), and the Act of August 31, 1964 (16 U.S.C. 837-837h).

(g)(1) As soon as practicable within nine months after the effective date of this Act, the Administrator shall commence necessary negotiations for, and offer, initial long-term contracts (within the limitations of the third sentence of section 5(a) of the Bonneville Project Act) simultaneously to —

(A) existing public body and cooperative customers and investor-owned utility customers under subsection (b);

(B) Federal agency customers under subsection (b);

(C) electric utility customers under subsection (c); and

(D) direct service industrial customers under subsection (d)(1).

(2) Each customer offered a contract pursuant to this subsection shall have one year from the date of such offer to accept such contract. Such contract shall be effective as provided in this subsection.

(3) An initial contract with a public body, cooperative, or investor-owned electric utility customer or a Federal agency customer pursuant to subsection (b) shall be effective on the date executed by such customer, unless another effective date is otherwise agreed to by the Administrator and the customer.

(4) An initial contract with an electric utility customer pursuant to subsection (c) shall be effective on the date

executed by such customer, but no earlier than the first day of the tenth month after the effective date of this Act.

(5) An initial contract with a direct service industrial customer pursuant to subsection (d)(1) shall be effective on the date agreed upon by the Administrator and such customer, but no later than the first day of the tenth month after the effective date of this Act. When such contract is executed, it may for rate purposes be given retroactive effect to such first day.

(6) Initial contracts offered public body, cooperative, and Federal agency customers in accordance with this subsection shall provide that during a period of insufficiency declared in accordance with subsection (b) each customer's contractual entitlement shall, to the extent of its requirements on the Administrator, be no less than the amount of firm power received from the Administrator in the year immediately preceding the period of insufficiency.

(7) The Administrator shall be deemed to have sufficient resources for the purpose of entering into the initial contracts specified in paragraph (1)(A) through (D).

CONSERVATION AND RESOURCE ACQUISITION

SECTION 6. (a) The Administrator shall acquire such resources, through conservation, implement all such conservation measures, and acquire such renewable resources which are installed by a residential or small commercial consumer to reduce load, as the Administrator determines are consistent with the plan or, if no plan is in effect, with the criteria of section 4(e)(1) and the considerations of section 4(e)(2) and, in the case of major resources, in accordance with subsection (c). Such conservation measures and such resources may include, but are not limited to —

(1) loans and grants to consumers for insulation or weatherization, increased system efficiency, and waste energy recovery by direct application,

(2) technical and financial assistance to, and other cooperation with, the Administrator's customers and governmental authorities to encourage maximum cost-effective voluntary conservation and the attainment of any cost-effective conservation objectives adopted by individual States or subdivisions thereof,

(3) aiding the Administrator's customers and governmental authorities in implementing model conservation standards adopted pursuant to section 4(f), and

(4) conducting demonstration projects to determine the cost effectiveness of conservation measures and direct application of renewable energy resources.

(b)(1) In addition to electric power acquired under subsection 5(c) or on a short-term basis pursuant to section 11(b)(6)(i) of the Federal Columbia River Transmission System Act (16 U.S.C. 838 and following), the Administrator, without considering restrictions which may apply pursuant to subsection 5(b), shall meet his contractual obligations to protect, mitigate and enhance fish and wildlife under section 4(h)(2) that remain after taking into account planned savings from measures provided for in subsection (a) by acquiring sufficient resources.

(2) Except as specifically provided in this section, acquisition of resources under this Act shall be consistent with the plan or, if no plan is in effect, consistent with the criteria of section 4(e)(1) and the considerations of section 4(e)(2) both as determined by the Administrator, and, in the case of major resources, in accordance with subsection (c).

(3) The Administrator shall acquire any non-Federal resources to replace Federal base system resources only in accordance with the provisions of this section. The Administrator shall include in the contracts for the acquisition of any such non-Federal replacement resources provisions that will enable him to ensure that such non-Federal replacement resources are developed and operated in a manner con-

sistent with the factors specified in section 4(e)(2) of this Act.

(4) Notwithstanding any acquisition of resources pursuant to this section, the Administrator shall not reduce his efforts to acquire and implement conservation and acquire renewable resources pursuant to subsection (a).

(5) In making any payment to an investor-owned utility for the acquisition under this subsection of any resource as defined by section 3(19)(A), or for the exchange of power under section 5(c), the Administrator shall exclude the costs of construction work in progress.

(c)(1) For each proposal under subsection (a), (b), (f), (h), or (l) to acquire a major resource, to implement a conservation measure which will conserve an amount of electric power equivalent to that of a major resource, to pay or reimburse investigation and preconstruction expenses of the sponsors of a major resource, or to grant billing credits or services involving a major resource, the Administrator shall —

(A) publish notice of the proposed action in the Federal Register and provide a copy of such notice to the Council, the Governor of each State in which facilities would be constructed or a conservation measure implemented, and the Administrator's customers;

(B) not less than sixty days following publication of such notice, conduct one or more public hearings, presided over by a hearing officer, at which testimony and evidence shall be received, with opportunity for such rebuttal and cross-examination as the hearing officer deems appropriate in the development of an adequate hearing record;

(C) develop a record to assist in evaluating the proposal which shall include the transcript of the public hearings, together with exhibits, and such other mate-

rials and information as may have been submitted to, or developed by, the Administrator, and

(D) following completion of such hearings, promptly provide to the Council and make public a written decision that includes, in addition to a determination respecting the requirements of subsection (a), (b), (f), (h), (l), or (m), as appropriate —

(i) if a plan is in effect, a finding that the proposal is either consistent or inconsistent with the plan or, notwithstanding its inconsistency with the plan, a finding that it is needed to meet the Administrator's obligations under this Act, or

(ii) if no plan is in effect, a finding that the proposal is either consistent or inconsistent with the criteria of section 4(e)(1) and the considerations of section 4(e)(2) or, notwithstanding its inconsistency, a finding that it is needed to meet the Administrator's obligations under this Act.

In the case of subsection (f), such decision shall be treated as satisfying the requirements of this subsection, if it includes a finding of probable consistency, based upon the Administrator's evaluation of information available at the time of completion of the hearing under this paragraph. Such decision shall include the reasons for such finding.

(2) Within sixty days after receipt of the Administrator's decision pursuant to paragraph (1)(D), the Council may determine by a majority vote of all members of the Council, and notify the Administrator, that the proposal is either consistent or inconsistent with the plan, or, if no plan is in effect, that the proposal is either consistent or inconsistent with the criteria of section 4(e)(1) and the considerations of section 4(e)(2): Provided, That the Council's authority to make consistency determinations if no plan is in effect shall cease upon the adoption of a plan or the

expiration of two years from the effective date of this Act, whichever is earlier.

(3) The Administrator may not implement any proposal referred to in paragraph (1) that is determined by either the Administrator or the Council to be inconsistent with the plan or, if no plan is in effect, with the criteria of section 4(e)(1) and the considerations of section 4(e)(2) unless (A) the Administrator determines that the resource is needed to meet the Administrator's contractual obligations under section 5 without considering restrictions which may apply pursuant to section 5(b), and (B) the expenditure of funds for that purpose has been specifically authorized by legislation enacted by the Congress pursuant to bills reported from the committees of Congress having jurisdiction, under the applicable rules of the respective Houses of Congress, over substantive amendments to the Federal Columbia River Transmission System Act and the Bonneville Project Act.

(4) Before the Administrator implements any proposal referred to in paragraph (1), the Administrator shall —

(A) submit to the appropriate committees of the Congress the administrative record of the decision (including any determination by the Council under paragraph (2) and a statement of the procedures followed or to be followed for compliance with the National Environmental Policy Act of 1969,

(B) publish notice of the decision in the Federal Register, and

(C) note the proposal in the Administrator's annual or supplementary budget submittal made pursuant to the Federal Columbia River Transmission System Act (16 U.S.C. 838 and following).

The Administrator may not implement any such proposal until ninety days after the date of publication in the Federal Register.

(d) The Administrator is authorized to acquire a resource, other than a major resource, whether or not such resource meets the criteria of section 4(e)(1) and the considerations of section 4(e)(2) but which he determines is an experimental, developmental, demonstration, or pilot project of a type with a potential for providing cost-effective service to the region. The Administrator shall make no obligation for the acquisition of such resource until it is included in the annual budgets submitted to the Congress pursuant to the Federal Columbia River Transmission System Act.

(e)(1) In order to effectuate the priority given to conservation measures and renewable resources under this Act, the Administrator shall, to the maximum extent practicable, make use of his authorities under this Act to acquire conservation measures and renewable resources, to implement conservation measures, and to provide credits and technical and financial assistance for the development and implementation of such resources and measures (including the funding of, and the securing of debt for, expenses incurred during the investigation and preconstruction of resources, as authorized in subsection (f)).

(2) To the extent conservation measures or acquisition of resources require direct arrangements with consumers, the Administrator shall make maximum practicable use of customers and local entities capable of administering and carrying out such arrangements.

(f)(1) For resources which the Administrator determines may be eligible for acquisition under this section and satisfy the criteria of section 4(e)(1) and the considerations of section 4(e)(2) or, if a plan is in effect, to be consistent with the plan, the Administrator is authorized to enter into agreements with sponsors of —

(A) a renewable resource, other than a major resource, to fund or secure debt incurred in the investigation and initial development of such resource, or

(B) any other resource to provide for the reimbursement of the sponsor's investigation and preconstruction expenses concerning such resource (which expenses shall not include procurement of capital equipment or construction material for such resource).

In the case of any resource referred to in subparagraph (B), such reimbursement is authorized only if —

(i) such resource is subsequently denied State siting approval or other necessary Federal or State permits, or approvals,

(ii) such investigation subsequently demonstrates, as determined by the Administrator, that such resource does not meet the criteria of section 4(e)(1) and the considerations of section 4(e)(2) or is not acceptable because of environmental impacts, or

(iii) after such investigation the Administrator determines not to acquire the resource and the sponsor determines not to construct the resource.

(2) The Administrator may exercise the authority of this subsection only if he does not foresee termination of the resource. If the Administrator reasonably foresees that certain actions of the resource sponsors may lead to termination of the resource, he shall specify such actions with particularity in the agreement and shall exclude reimbursement if the resource sponsors take such actions. In no event shall the Administrator agree to reimburse expenses incurred prior to the effective date of this Act or of the agreement.

(3) Any agreement under paragraph (1) shall provide the Administrator an option to acquire any such resource, including a renewable resource, and shall include such other provisions, as the Administrator deems appropriate, for the Administrator's recovery from such sponsors or any assignee of the sponsors, if such sponsor or assignee continues development of the resource, of any advances made by the Administrator pursuant to such agreement.

(4) The Administrator shall not reimburse any expense incurred by the sponsors (except necessary expenses involved in the liquidation of the resource) after the date of a final denial of application for State siting approval or after the date the Administrator determines that the resource to be inconsistent with the plan or the criteria of section 4(e)(1) and the considerations of section 4(e)(2).

(g) At the request of the appropriate State, any environmental impact statement which may be required with respect to a resource, to the extent determined possible by the Administrator in accordance with applicable law and regulations, may be prepared jointly and in coordination with any required environmental impact statement of the State or any other statement which serves the purpose of an environmental impact statement which is required by State law.

(h)(1) If a customer so requests, the Administrator shall grant billing credits to such customer, and provide services to such customer at rates established for such services, for —

(A) conservation activities independently undertaken or continued after the effective date of this Act by such customer or political subdivision served by such customer which reduce the obligation of the Administrator that would otherwise have existed to acquire other resources under this Act, or

(B) resources constructed, completed, or acquired after the effective date of this Act by a customer, an entity acting on behalf of such customer, or political subdivision served by the customer which reduce the obligation of the Administrator to acquire resources under this Act. Such resources shall be renewable resources or multipurpose projects or other resources which are not inconsistent with the plan or, in the absence of a plan, not inconsistent with the criteria of section 4(e)(1) and the considerations of section 4(e)(2).

(2) The energy and capacity on which a credit under this subsection to a customer is based shall be the amount by which a conservation activity or resource actually changes the customer's net requirement for supply of electric power or reserves from the Administrator.

(3) The amount of credits for conservation under this subsection shall be set to credit the customer implementing or continuing the conservation activity for which the credit is granted for the savings resulting from such activity. The rate impact on the Administrator's other customers of granting the credit shall be equal to the rate impact such customers would have experienced had the Administrator been obligated to acquire resources in an amount equal to that actually saved by the activity for which the credit is granted.

(4) For resources other than conservation, the customer shall be credited for net costs actually incurred by such customer, an entity acting on behalf of such customer, or political subdivision served by such customer, in acquiring, constructing, or operating the resource for which the credit is granted. The rate impact to the Administrator's other customers of granting the credit shall be no greater than the rate impact such customers would have experienced had the Administrator been obligated to acquire resources in an amount equal to that actually produced by the resource for which the credit is granted.

(5) Retail rate structures which are voluntarily implemented by the Administrator's customers and which induce conservation or installation of consumer-owned renewable resources shall be considered, for purposes of this subsection, to be (A) conservation activities independently undertaken or carried on by such customers, or (B) customer-owned renewable resources, and shall qualify for billing credits upon the same showing as that required for other conservation or renewable resource activities.

(6) Prior to executing a contract for any billing credit or related services pursuant to this subsection, the Administrator shall —

(A) Comply with the notice and hearing provisions of subsection (c), and include in such notice the methodology the Administrator proposes to use in determining the amount of any such credit;

(B) Include the cost of such credit in the Administrator's annual or amended budget submittal to the Congress made pursuant to the Federal Columbia River Transmission System Act (16 U.S.C. 838(j));

(C) Include in such contract provisions to ensure that resources in excess of a customer's reasonable load growth shall have been offered to others for ownership, participation or other sponsorship pursuant to subsection (m), except in the case of conservation, multipurpose projects uniquely suitable for development by the customer, or renewable resources; and

(D) Include in such contract provisions to ensure that the operators of any generating resource for which a billing credit is to be granted agree to operate such resource in a manner compatible with the planning and operation of the region's power system.

(i) Contracts for the acquisition of resources and for billing credits for major resources, including conservation activities, entered into pursuant to this section shall contain such terms and conditions, applicable after the contract is entered into, as will —

(1) insure timely construction, scheduling, completion, and operation of resources,

(2) insure that the costs of any acquisition are as low as reasonably possible, consistent (A) with sound engineering, operating, and safety practices and (B) the protection, mitigation, and enhancement of fish and wildlife, including related spawning grounds and

habitat, affected by the development of such resources, and

(3) insure that the Administrator exercises effective oversight, inspection, audit, and review of all aspects of such construction and operation, including environmental protection.

Such contracts shall contain provisions assuring that the Administrator has the authority to approve all costs of and proposals for, major modifications in construction, scheduling, or operations and to assure that the Administrator is provided with such current information as he deems necessary to evaluate such construction and operation.

(j)(1) All contractual and other obligations required to be carried out by the Administrator pursuant to this Act shall be secured solely by the Administrator's revenues received from the sale of electric power and other services. Such obligations are not, nor shall they be construed to be, general obligations of the United States, nor are such obligations intended to be or are they secured by the full faith and credit of the United States.

(2) All contracts entered into by the Administrator for the acquisition of resources pursuant to this Act shall require that, in the sale of any obligations, all offerings and promotional material for the sale of such obligations shall include the language contained in the second sentence of paragraph (1). The Administrator shall monitor and enforce such requirement.

(k) In the exercise of his authorities pursuant to this section, the Administrator shall, consistent with the provisions of this Act and the Administrator's obligations to particular customer classes, insure that benefits under this section, including financial and technical assistance, conduct of conservation demonstrations, and experimental projects, services, and billing credits, are distributed equitably throughout the region.

(1)(1) The Administrator is authorized and directed to investigate opportunities for adding to the region's resources or reducing the region's power costs through the accelerated or cooperative development of resources located outside the States of Idaho, Montana, Oregon, and Washington if such resources are renewable resources, and are now or in the future planned or considered for eventual development by nonregional agencies or authorities that will or would own, sponsor, or otherwise develop them. The Administrator shall keep the Council fully and currently informed of such investigations, and seek the Council's advice as to the desirability of pursuing such investigations.

(2) The Administrator is authorized and directed to investigate periodically opportunities for mutually beneficial interregional exchanges of electric power that reduce the need for additional generation or generating capacity in the Pacific Northwest and the regions with which such exchanges may occur. The Council shall take into consideration in formulating a plan such investigations.

(3) After the Administrator submits a report to Congress pursuant to paragraph (5), the Administrator is authorized to acquire resources consistent with such investigations and consistent with the plan or, if no plan is in effect, with the priorities of section 4(e)(1) and the considerations of section 4(e)(2). Such acquisitions shall be in accordance with the provisions of this section.

(4) The Administrator shall conduct the investigations and the acquisitions, if any, authorized under this subsection with the assistance of other Federal agencies as may be appropriate.

(5) No later than July 1, 1981, the Administrator shall submit to the Congress a report of the result of the investigations undertaken pursuant to this subsection, together with the prospects for obtaining additional resources under the authority granted by this subsection and for reductions in generation or generating capacity through exchanges.

(m) Except as to resources under construction on the effective date of this Act, the Administrator shall determine in each case of a major resource acquisition that a reasonable share of the particular resource, or a reasonable equivalent, has been offered to each Pacific Northwest electric utility for ownership, participation, or other sponsorship, but not in excess of the amounts needed to meet such utility's regional load.

(n) The Council may authorize the Administrator to implement a proposal not subject to the provisions of section 6(c)(1) upon satisfaction of the requirements of section 6(c)(4) notwithstanding a finding by the Administrator that such proposal is inconsistent with the plan, or, if no plan is in effect, inconsistent with the criteria of section 4(e)(1) and the considerations of section 4(e)(2).

(o) The Council or any customer of the Administrator may request the Administrator to take action under section 6 to carry out his responsibilities under this section. Within 60 days of the receipt of such request, the Administrator shall respond in writing either that he will propose the action and will initiate the procedures of this section in order to review the action, or that he will not propose the action and the reasons why such action would not be timely or would not be consistent with the plan or with the Administrator's obligations under this Act or other provisions of law which the Administrator shall specifically identify.

RATES

SECTION 7. (a)(1) The Administrator shall establish, and periodically review and revise, rates for the sale and disposition of electric energy and capacity and for the transmission of non-Federal power. Such rates shall be established and, as appropriate, revised to recover, in accordance with sound business principles, the costs associated with the acquisition, conservation, and transmission of electric power, including the amortization of the Federal investment in the Federal Columbia River Power System

(including irrigation costs required to be repaid out of power revenues) over a reasonable period of years and the other costs and expenses incurred by the Administrator pursuant to this Act and other provisions of law. Such rates shall be established in accordance with sections 9 and 10 of the Federal Columbia River Transmission System Act (16 U.S.C. 838), section 5 of the Flood Control Act of 1944, and the provisions of this Act.

(2) Rates established under this section shall become effective only upon confirmation and approval by the Federal Energy Regulatory Commission upon a finding by the Commission, that such rates—

(A) are sufficient to assure repayment of the Federal investment in the Federal Columbia River Power System over a reasonable number of years after first meeting the Administrator's other costs;

(B) are based upon the Administrator's total system costs, and

(C) insofar as transmission rates are concerned, equitably allocate the costs of the Federal transmission system between Federal and non-Federal utilizing such system.

(b)(1) The Administrator shall establish a rate or rates of general application for electric power sold to meet the general requirements of public body, cooperative, and Federal agency customers within the Pacific Northwest, and loads of electric utilities under section 5(c). Such rate or rates shall recover the costs of that portion of the Federal base system resources needed to supply such loads until such sales exceed the Federal base system resources. Thereafter, such rate or rates shall recover the cost of additional electric power as needed to supply such loads, first from the electric power acquired by the Administrator under section 5(c) and then from other resources.

(2) After July 1, 1985, the projected amounts to be charged for firm power for the combined general require-

ments of public body, cooperative, and Federal agency customers, exclusive of amounts charged such customers under subsection (g) for the costs of conservation, resource and conservation credits, experimental resources, and uncontrollable events, may not exceed in total, as determined by the Administrator, during any year after July 1, 1985, plus the ensuing four years, an amount equal to the power costs for general requirements of such customers if, the Administrator assumes that—

(A) the public body and cooperative customers' general requirements had included during such five-year period the direct service industrial customer loads which are—

(i) served by the Administrator, and

(ii) located within or adjacent to the geographic service boundaries of such public bodies and cooperatives;

(B) public body, cooperative, and Federal agency customers were served, during such five-year period, with Federal base system resources not obligated to other entities under contracts existing as of the effective date of this Act (during the remaining term of such contracts) excluding obligations to direct service industrial customer loads included in subparagraph (A);

(C) no purchases or sales by the Administrator as provided in section 5(c) were made during such five-year period;

(D) all resources that would have been required, during such five-year period, to meet remaining general requirements of the public body, cooperative and Federal agency customers (other than requirements met by the available Federal base system resources determined under subparagraph (B)) were—

(i) purchased from such customers by the Administrator pursuant to section 6, or

(ii) not committed to load pursuant to section 5(b),

and were the least expensive resources owned or purchased by public bodies or cooperatives; and any additional needed resources were obtained at the average cost of all other new resources acquired by the Administrator; and

(E) the quantifiable monetary savings, during such five-year period, to public body, cooperative, and Federal agency customers resulting from—

(i) reduced public body and cooperative financing costs as applied to the total amount of resources, other than Federal base system resources, identified under subparagraph (D), and

(ii) reserve benefits as a result of the Administrator's actions under this Act

were not achieved.

(3) Any amounts not charged to public body, cooperative, and Federal agency customers by reason of paragraph (2) shall be recovered through supplemental rate charges for all other power sold by the Administrator to all customers. Rates charged public body, cooperative, or Federal agency customers pursuant to this subsection shall not include any costs or benefits of a net revenue surplus or deficiency occurring for the period ending June 30, 1985, to the extent such surplus or deficiency is caused by —

(A) a difference between actual power deliveries and power deliveries projected for the purpose of establishing rates to direct service industrial customers under subsection (c)(1), and

(B) an overrecovery or underrecovery of the net costs incurred by the Administrator under section 5(c) as a result of such difference.

Any such revenue surplus or deficiency incurred shall be recovered from, or repaid to, customers over a reasonable period of time after July 1, 1985, through a supplemental rate charge or credit applied proportionately for all other power sold by the Administrator at rates established under other subsections of this section prior to July 1, 1985.

(4) The term "general requirements" as used in this section means the public body, cooperative, or Federal agency customer's electric power purchased from the Administrator under section 5(b), exclusive of any new large single load.

(c)(1) The rate or rates applicable to direct service industrial customers shall be established —

(A) for the period prior to July 1, 1985, at a level which the Administrator estimates will be sufficient to recover the cost of resources the Administrator determines are required to serve such customers' load and the net costs incurred by the Administrator pursuant to section 5(c), based upon the Administrator's projected ability to make power available to such customers pursuant to their contracts, to the extent that such costs are not recovered through rates applicable to other customers; and

(B) for the period beginning July 1, 1985, at a level which the Administrator determines to be equitable in relation to the retail rates charged by the public body and cooperative customers to their industrial consumers in the region.

(2) The determination under paragraph (1)(B) shall be based upon the Administrator's applicable wholesale rates to such public body and cooperative customers and the typical margins included by such public body and cooperative customers in their retail industrial rates but shall take into account —

(A) the comparative size and character of the loads served,

(B) the relative costs of electric capacity, energy, transmission, and related delivery facilities provided and other service provisions, and

(C) direct and indirect overhead costs,

all as related to the delivery of power to industrial customers, except that the Administrator's rates during such period shall in no event be less than the rates in effect for the contract year ending on June 30, 1985.

(3) The Administrator shall adjust such rates to take into account the value of power system reserves made available to the Administrator through his rights to interrupt or curtail service to such direct service industrial customers.

(d)(1) In order to avoid adverse impacts on retail rates of the Administrator's customers with low-system densities, the Administrator shall, to the extent appropriate, apply discounts to the rate or rates for such customers.

(2) In order to avoid adverse impacts on direct service industrial customers using raw materials indigenous to the region as their primary resource, the Administrator is authorized to establish a special rate applicable to such customer if all power sold to such customer may be interrupted, curtailed, or withdrawn to meet firm loads in the region.

(e) Nothing in this Act prohibits the Administrator from establishing, in rate schedules of general application, a uniform rate or rates for sale of peaking capacity or from establishing time-of-day, seasonal rates, or other rate forms.

(f) Rates for all other firm power sold by the Administrator for use in the Pacific Northwest shall be based upon the cost of the portions of Federal base system resources, purchases of power under section 5(c), and additional resources which, in the determination of the Administrator, are applicable to such sales.

(g) Except to the extent that the allocation of costs and benefits is governed by provisions of law in effect on the

effective date of this Act, or by other provisions of this section, the Administrator shall equitably allocate to power rates, in accordance with generally accepted ratemaking principles and the provisions of this Act, all costs and benefits not otherwise allocated under this section, including, but not limited to, conservation, fish and wildlife measures, uncontrollable events, reserves, the excess costs of experimental resources acquired under section 6, the cost of credits granted pursuant to section 6, operating services, and the sale of or inability to sell excess electric power.

(h) Notwithstanding any other provision of this section (except the provisions of subsection (a)), the Administrator shall adjust power rates to include any surcharges arising under section 4(f), and shall allocate any revenues from such charges in such manner as the Administrator determines will help achieve the purposes of section 4(f).

(i) In establishing rates under this section, the Administrator shall use the following procedures:

(1) Notice of the proposed rates shall be published in the Federal Register with a statement of the justification and reasons supporting such rates. Such notice shall include a date for a hearing in accordance with paragraph (2).

(2) One or more hearings shall be conducted as expeditiously as practicable by a hearing officer to develop a full and complete record and to receive public comment in the form of written or oral presentation of views, data, questions, and argument related to such proposed rates. In any such hearing —

(A) any person shall be provided an adequate opportunity by the hearing officer to offer refutation or rebuttal of any material submitted by any other person or the Administrator, and

(B) the hearing officer shall allow for cross-examination to develop information and material relevant to any such proposed rate.

(3) In addition to the opportunity to submit oral and written material at the hearings, any written views, data, questions, and arguments submitted by persons prior to, or before, the close of hearings shall be made a part of the administrative record.

(4) After such a hearing, the Administrator may propose revised rates, publish such proposed rates in the Federal Register, and conduct additional hearings in accordance with this subsection.

(5) The Administrator shall make a final decision establishing a rate or rates based on the record which shall include the hearing transcript, together with exhibits, and such other materials and information as may have been submitted to, or developed by, the Administrator. The decision shall include a full and complete justification of the final rates pursuant to this section.

(6) The final decision of the Administrator shall become effective on confirmation and approval of such rates by the Federal Energy Regulatory Commission pursuant to subsection (a)(2). The Commission shall have the authority, in accordance with such procedures as the Commission may establish, to approve the final rate submitted by the Administrator on an interim basis, pending the Commission's final decision in accordance with such subsection: *Provided, That*, until the Commission has established appropriate procedures for interim approval, the Secretary shall have authority to approve on an interim basis final rates submitted by the Administrator.

(j) All rate schedules adopted, and all power billings rendered, by the Administrator pursuant to this section shall indicate —

(1) the approximate cost contribution of different resource categories to the Administrator's rates for the sale of energy and capacity, and

(2) the cost of resources acquired to meet load growth within the region and the relation of such cost to the average cost of resources available to the Administrator.

(k) Notwithstanding any other provision of this Act, all rates or rate schedules for the sale of nonfirm electric power within the United States, but outside the region, shall be established after the date of this Act by the Administrator in accordance with the procedures of subsection (i) of this section (other than the first sentence of paragraph (6) thereof) and in accordance with the Bonneville Project Act, the Flood Control Act of 1944, and the Federal Columbia River Transmission System Act. Notwithstanding section 201(f) of the Federal Power Act, such rates or rate schedules shall become effective after review by the Federal Energy Regulatory Commission for conformance with the requirements of such Acts and after approval thereof by the Commission. Such review shall be based on the record of proceedings established under subsection (i) and this subsection. The parties to such proceedings under subsection (i) shall be afforded an opportunity by the Commission for an additional hearing in accordance with the procedures established for ratemaking by the Commission pursuant to the Federal Power Act.

(1) In order to further the purposes of this Act and to protect the consumers of the region, the Administrator may negotiate, or establish, rates for electric power sold by the Administrator to any entity not located in the United States which shall be equitable in relation to rates for all electric power which is, or may be, purchased by the Administrator or the Administrator's customers from entities outside the United States. In establishing rates other than by negotiation, the provisions of subsection (i) shall apply. In the case of any negotiation with an entity not located in the United States, the Administrator shall provide public notice of any proposal to negotiate such rates. Such negotiated rates shall be not less than the rates

established under this Act for nonfirm power sold within the United States but outside the region. The Administrator shall also afford notice of any rates negotiated pursuant to this subsection.

AMENDMENTS TO EXISTING LAW

SECTION 8. (a) Section 11(b) of the Federal Columbia River Transmission System Act (16 U.S.C. 837) is amended by striking out the semicolon at the end of paragraph (6) and inserting in lieu thereof “, or (iv) on a short term basis to meet the Administrator’s obligations under section 4(h)(2) of the Pacific Northwest Electric Power Planning and Conservation Act;”.

(b) Section 11(b) of the Federal Columbia River Transmission System Act (16 U.S.C. 838) is amended by striking out “and” at the end of paragraph (10), by striking out the period at the end of paragraph (11) and inserting in lieu thereof “; and”, and by adding at the end thereof the following new paragraph:

“(12) making such payments, as shall be required to carry out the purposes and provisions of the Pacific Northwest Electric Power Planning and Conservation Act.”.

(c) Subsection (b) of section 13 of such Act is amended by striking out “and 11(b)(11)” and inserting in lieu thereof “, 11(b)(11), and 11(b)(12)”.

(d)(1) The first sentence of subsection (a) of section 13 of such Act is amended by inserting “(1)” after “is authorized”, by inserting after the word “system,” the following: “and to implement the Administrator’s authority pursuant to the Pacific Northwest Electric Power Planning and Conservation Act (including his authority to provide financial assistance for conservation measures, renewable resources, and fish and wildlife, but not including the authority to acquire under section 6 of that Act electric

power from any generating facility not utilizing a renewable resource or from a generating facility utilizing a renewable resource and having a planned capability greater than fifty average megawatts),", and by inserting "(2)" before "to issue and sell bonds to refund such bonds".

(2) The fourth sentence of such subsection (a) is amended by inserting the following before the period at the end thereof: "issued by Government corporations. Based on information provided by the Administrator to the Secretary of the Treasury, the interest rate determined pursuant to the immediately preceding sentence will be increased by 1 per centum thereof for each immediately preceding consecutive fiscal year, beginning with the fiscal year in which this Act becomes effective, that the applicable financial reports, including current repayment studies, of the Administrator show repayment criteria not being met".

(3) Such subsection (a) is further amended by inserting the following before the period at the end thereof: "prior to October 1, 1981. Such aggregate principal limitation shall be increased by an additional \$1,250,000,000 after October 1, 1981, as provided in advance in annual appropriation Acts, and such increased amount shall be reserved for the purpose of providing funds for conservation and renewable resource loans and grants in a special revolving account created therefor in the Fund. The funds from such revolving account shall not be deemed State or local funds".

(e) Clause (2) of section 1(b) of the Act of August 31, 1964 (78 Stat. 756) is amended to read as follows: "(2) any contiguous areas, not in excess of seventy-five airline miles from said region, which are a part of the service area of a rural electric cooperative served by the Administrator on the effective date of the Pacific Northwest Electric Power Planning and Conservation Act which has a distribution system from which it serves both within and without said region."

(f) Section 7 of the Federal Columbia River Transmission System Act is amended by inserting "(a)" after "7" and by adding the following new subsection at the end thereof:

"(b)(1) From amounts available to the Administrator from the fund under section 11(b)(2), the Administrator shall make annual impact aid payments to State and local governments having within their jurisdiction the transmission facilities described in paragraph (2). The Administrator may also make impact aid payments to State and local governments with respect to transmission facilities of the Administrator other than those described in paragraph (2) where the construction of such facilities, or any substantial modification thereof, is completed after the date of enactment of the Pacific Northwest Electric Power Planning and Conservation Act and the Administrator determines that such facilities have a substantial impact on the State and local government concerned.

"(2) The transmission facilities for which payments shall be made under this subsection are any major transmission facilities —

"(A) which are owned by the Bonneville Power Administration;

"(B) which are exempt from State and local real property taxes; and

"(C) initial construction of which was completed after the date of the enactment of the Pacific Northwest Electric Power Planning and Conservation Act.

"(3)(A) The payments made under this subsection for any year shall be determined on the basis of a regionwide formula established by the Administrator by rule, after notice and opportunity for public hearing and after consultation with State and local governments in the region and the Administrator's customers in the region. Such formula shall provide for an annual payment based on (i) the

amount of land and interests in land acquired by the Administrator for purposes of constructing the facility, and the value of the facilities constructed thereon, and (ii) the costs of all governmental services related to the facility and an appropriate share of the general government expenses which are ordinarily paid from State and local real property taxes. No annual payment to any such State or local government may exceed such amount as the Administrator determines would be paid to such government during that year if the transmission facilities were not exempt from State and local real property taxation."

ADMINISTRATIVE PROVISIONS

SECTION 9. (a) Subject to the provisions of this Act and the Bonneville Project Act, the Administrator is authorized to contract in accordance with section 2(f) of the Bonneville Project Act of 1937 (16 U.S.C. 832a(f)).

(b) The Administrator shall discharge the executive and administrative functions of his office in accordance with the policy established by the Bonneville Project Act of 1937 (16 U.S.C. 832 and following), sections 302(a) (2) and (3) of the Department of Energy Organization Act, and this Act. The Secretary of Energy, the Council, and the Administrator shall take such steps as are necessary to assure the timely implementation of this Act in a sound and businesslike manner.

(c) Any contract of the Administrator for the sale or exchange of electric power for outside the Pacific Northwest shall be subject to limitations and conditions corresponding to those provided in sections 2 and 3 of the Act of August 31, 1964 (16 U.S.C. 837a and 837b) for any contract for the sale, delivery, or exchange of hydroelectric energy or peaking capacity generated within the Pacific Northwest for use outside the Pacific Northwest. In applying such sections for the purposes of this subsection, the term "surplus energy" shall mean electric energy for which there is no

market in the Pacific Northwest at any rate established for the disposition of such energy, and the term "surplus peaking capacity" shall mean electric peaking capacity for which there is no demand in the Pacific Northwest at the rate established for the disposition of such capacity. The authority granted, and duties imposed upon, the Secretary by sections 5 and 7 of such Act (16 U.S.C. 837e and 837f) shall also apply to the Administrator in connection with resources acquired by the Administrator pursuant to this Act. The Administrator shall, in making any determination, under any contract executed pursuant to section 5, of the electric power requirements of any Pacific Northwest customer, which is a non-Federal entity having its own generation, exclude, in addition to hydroelectric generated energy excluded from such requirements pursuant to section 3(d) of such Act (16 U.S.C. 837b(d)), any amount of energy included in the resources of such customer for service to firm loads in the region if (1) such amount was disposed of by such customer outside the region, and (2) as a result of such disposition, the firm energy requirements of such customer or other customers of the Administrator are increased. Such amount of energy shall not be excluded, if the Administrator determines that through reasonable measures such amount of energy could not be conserved or otherwise retained for service to regional loads. The Administrator may sell as replacement for any amount of energy so excluded only energy that would otherwise be surplus.

(d) No restrictions contained in subsection (c) shall limit or interfere with the sale, exchange, or other disposition of any power by any utility or group thereof from any existing or new non-Federal resource if such sale, exchange, or disposition does not increase the amount of firm power the Administrator would be obligated to provide to any customer. The Administrator, in addition to the directives contained in subsections (i)(1)(B) and (i)(3), and subject to any contractual obligations of the Administrator, or any

other obligations under existing law, shall (1) provide transmission access, load factoring, storage and other services normally attendant thereto to such utilities and (2) shall not discriminate on the basis of independent development of resources against any utility or group thereof in providing such services.

(e)(1) For purposes of sections 701 through 706 of title 5, United States Code, the following actions shall be final actions subject to judicial review —

(A) adoption of the plan or amendments thereto by the Council under section 4, and adoption of the program by the Council under section 4(h) ;

(B) sales, exchanges, and purchases of electric power under section 5 ;

(C) the Administrator's acquisition of resources under section 6 ;

(D) implementation of conservation measures under section 6 ;

(E) execution of contracts for assistance to sponsors under section 6(f) ;

(F) granting of credits under section 6(h) ; and

(G) establishment of a regionwide formula under section 7(b)(3) of the Federal Columbia River Transmission System Act.

(2) The record upon review of such final actions shall be limited to the administrative record compiled in accordance with this Act. The scope of review of such actions without a hearing or after a hearing shall be governed by section 706 of title 5, United States Code. The scope of review of an action under section 6(c) shall be governed by section 706 of title 5, United States Code. Nothing in this section shall be construed to require a hearing pursuant to section 554 or 557 of title 5 of the United States Code.

(3) Nothing in this section shall be construed to preclude judicial review of other final actions and decisions by the Council or Administrator.

(4) For purposes of this subsection —

(A) major resources shall be deemed to be acquired upon publication in the Federal Register pursuant to section 6(c)(4)(B) ;

(B) resources, other than major resources, shall be deemed to be acquired upon execution of the contract therefor;

(C) conservation measures shall be deemed to be implemented upon execution of the contract or grant therefor; and

(D) rate determinations pursuant to section 7 shall be deemed final upon confirmation and approval by the Federal Energy Regulatory Commission.

(5) Suits to challenge final actions and decisions taken pursuant to this Act, or the implementation of such final actions, whether brought pursuant to this Act, the Bonneville Project Act, the Act of August 31, 1964 (16 U.S.C. 837-837h), or the Federal Columbia River Transmission System Act (16 U.S.C. 838 and following), shall be filed in the appropriate Federal court in the case of rates under section 7 and in the United States court of appeals for the region in the case of other actions or decisions subject to the provisions of this subsection. Such suits shall be filed within ninety days of the time such action or decision is deemed final, or, if notice of the action is required by this Act to be published in the Federal Register, within ninety days from such notice, or be barred. In the case of a challenge of the plan or amendments thereto, such suit shall be filed within sixty days after publication of a notice of such final action in the Federal Register. Such courts shall have jurisdiction to hear and determine any suit brought as provided in this section. The plan, as finally adopted or

portions thereof, or amendments thereto, shall not thereafter be reviewable as a part of any other action under this Act or any other law administered by the Administrator.

(f) For purposes of enabling the Administrator to acquire resources necessary to meet the firm load of public bodies, cooperatives, and Federal agencies from a governmental unit at a cost no greater than the cost which would be applicable in the absence of such acquisition, the exemption from gross income of interest on certain governmental obligations provide in section 103(a)(1) of the Internal Revenue Code of 1954 shall not be affected by the Administrator's acquisition of such resources if —

(1) the Administrator, prior to contracting for such acquisition, certifies to his reasonable belief, that the persons for whom the Administrator is acquiring such resources for sale pursuant to section 5 of this Act are public bodies, cooperatives, and Federal agencies, unless the Administrator also certifies that he is unable to acquire such resources without selling a portion thereof to persons who are not exempt persons (as defined in section 103(b) of such Code), and

(2) based upon such certification, the Secretary of the Treasury determines in accordance with applicable regulations that less than a major portion of the resource is to be furnished to persons who are not exempt persons (as defined in section 103(b) of such Code).

The certification under paragraph (1) shall be made in accordance with this subsection and a procedure and methodology approved by the Secretary of the Treasury. For purposes of this subsection, the term "major portion" shall have the meaning provided by regulations issued by the Secretary of the Treasury.

(g) When reviewing rates for the sale of power to the Administrator by an investor-owned utility customer under section 5(c) or 6, the Federal Energy Regulatory Commis-

sion shall, in accordance with section 209 of the Federal Power Act (16 U.S.C. 824h) —

(1) convene a joint State board, and

(2) invest such board with such duties and authority as will assist the Commission in its review of such rates.

(h)(1) No "company" (as defined in section 2(a)(2) of the Public Utility Holding Company Act of 1935; 15 U.S.C. 79b(a)(2)), which owns or operates facilities for the generation of electricity (together with associated transmission and other facilities) primarily for sale to the Administrator under section 6 shall be deemed an "electric utility company" (as defined in section 2(a)(3) of the Public Utility Holding Company Act of 1935; 15 U.S.C. 79b(a)(3)), within the meaning of any provision or provisions of chapter 2C of title 15 of the United States Code, if at least 90 per centum of the electricity generated by such company is sold to the Administrator under section 6, and if —

(A) the organization of such company is consistent with the policies of the Public Utility Holding Company Act of 1935, as determined by the Securities and Exchange Commission, with the concurrence of the Administrator, at the time of such organization; and

(B) participation in any facilities of such "company" has been offered to public bodies and cooperatives in the region pursuant to section 6(m).

(2) The Administrator shall include in any contract for the acquisition of a major resource from such "company" provisions limiting the amount of equity investment, if any, in such "company" to that which the Administrator determines will be consistent with achieving the lowest attainable power costs attributable to such major resource.

(3) In the case of any "company" which meets the requirements of paragraph (1), the Administrator, with the concurrence of such Commission, shall approve all signifi-

cant contracts entered into by, and between, such "company" and any sponsor company or any subsidiary of such sponsor company which are determined to be consistent with the policy of the Public Utility Holding Company Act of 1935 at the time such contracts are entered into. The Administrator and the Securities and Exchange Commission shall exercise such approval authority within sixty days after receipt of such contracts. Such contracts shall not be effective without such approval.

(4) Paragraph (1) of this subsection shall continue to apply to any such "company" unless the Administrator or the Securities and Exchange Commission, or both, through periodic review, (A) determines at any time that the "company" no longer operates in a manner consistent with the policy of the Public Utility Holding Company Act of 1935 and in accordance with this subsection, and (B) notify the "company" in writing of such preliminary determination. This subsection shall cease to apply to such "company" thirty days after receipt of notification of a final determination thereof. A final determination shall be made only after public notice of the preliminary determination and after a hearing completed not later than sixty days from the date of publication of such notice. Such final determination shall be made within thirty days after the date of completion of such hearing.

(i)(1) At the request and expense of any customer or group of customers of the Administrator within the Pacific Northwest, the Administrator shall, to the extent practicable —

(A) acquire any electric power required by (i) any customer or group of customers to enable them to replace resources determined to serve firm load under section 5(b), or (ii) direct service industrial customers to replace electric power that is or may be curtailed or interrupted by the Administrator (other than power the Administrator is obligated to replace), with the cost of such replacement power to be distributed among the

direct service industrial customers requesting such power; and

(B) dispose of, or assist in the disposal of, any electric power that a customer or group of customers proposes to sell within or without the region at rates and upon terms specified by such customer or group of customers, if such disposition is not in conflict with the Administrator's other marketing obligations and the policies of this Act and other applicable laws.

(2) In implementing the provisions of subparagraphs (A) and (B) of paragraph (1), the Administrator may prescribe policies and conditions for the independent acquisition of disposition of electric power by any direct service industrial customer or group of such customers for the purpose of assuring each direct service industrial customer an opportunity to participate in such acquisition or disposition.

(3) The Administrator shall furnish services including transmission, storage, and load factoring unless he determines such services cannot be furnished without substantial interference with his power marketing program, applicable operating limitations, or existing contractual obligations. The Administrator shall, to the extent practicable, give priority in making such services available for the marketing, within and without the Pacific Northwest, of capability from projects under construction on the effective date of this Act, if such capability has been offered for sale at cost, including a reasonable rate of return, to the Administrator pursuant to this Act and such offer is not accepted within one year.

(j)(1) The Council, as soon as practicable after the enactment of this Act, shall prepare, in consultation with the Administrator, the customers, appropriate State regulatory bodies, and the public, a report and shall make recommendations with respect to the various retail rate designs which will encourage conservation and efficient use of

electric energy and the installation of consumer-owned renewable resources on a cost-effective basis, as well as areas for research and development for possible application to retail utility rates within the region. Studies undertaken pursuant to this subsection shall not affect the responsibilities of any customer or the Administrator which may exist under the Public Utility Regulatory Policies Act of 1978.

(2) Upon request, and solely on behalf of customers so requesting, the Administrator is authorized to (A) provide assistance in analyzing and developing retail rate structures that will encourage cost-effective conservation and the installation of cost-effective consumer-owned renewable resources; (B) provide estimates of the probable power savings and the probable amount of billing credits under section 6(h) that might be realized by such customers as a result of adopting and implementing such retail rate structures; and (C) solicit additional information and analytical assistance from appropriate State regulatory bodies and the Administrator's other customers.

(k) There is hereby established within the administration an Assistant Administrator position for conservation and renewable resources. Such Assistant Administrator shall be appointed by the Administrator and shall be assigned responsibility for conservation and direct-application renewable resource programs (including the administration of financial assistance for such programs). Such position is hereby established in the senior executive service in addition to the number of such positions heretofore established in accordance with other provisions of law applicable to such positions.

SAVINGS PROVISIONS

SECTION 10. (a) Nothing in this Act shall be construed to affect or modify any right of any State or political subdivision thereof or electric utility to —

(1) determine retail electric rates, except as provided by section 5(c)(3);

(2) develop and implement plans and programs for the conservation, development, and use of resources; or

(3) make energy facility siting decisions, including, but not limited to, determining the need for a particular facility, evaluating alternative sites, and considering alternative methods of meeting the determined need.

(b) Nothing in this Act shall alter, diminish, or abridge the rights and obligations of the Administrator or any customer under any contract existing as of the effective date of this Act.

(c) Nothing in this Act shall alter, diminish, abridge, or otherwise affect the provisions of other Federal laws by which public bodies and cooperatives are entitled to preference and priority in the sale of federally generated electric power.

(d) If any provision of this Act is found to be unconstitutional, then any contract entered into by the Administrator, prior to such finding and in accordance with such provisions, to sell power, acquire or credit resources, or to reimburse investigation and preconstruction expenses pursuant to section 5, and section 6 (a), (b), (f), or (h) of this Act shall not be affected by such finding.

(e) Nothing in this Act shall be construed to affect or modify any treaty or other right of an Indian tribe.

(f)(1) Nothing in this Act shall be construed as authorizing the appropriation of water by any Federal, State, or local agency, Indian tribe, or any other entity or individual.

(2) In the implementation of this Act, the United States, its agents, permittees, or licensees shall not appropriate, use, divert, dedicate, or claim water within any State unless such appropriation, use, diversion, dedication, or claim takes place pursuant to substantive and procedural provisions of State law, regulation, or rule of law, including the establishment, exercise or enforcement of terms or con-

ditions, governing appropriation, use, diversion, or dedication of water.

(3) Nothing in this Act shall alter in any way any provision of State law, regulation, or rule of law or of any interstate compact governing the appropriation, use, diversion, dedication of, or claim to, water.

(4) Nothing in this Act shall be construed as altering or affecting the rights of any Indian tribe.

(g) Nothing in this Act shall obligate the Federal Government for the performance of any new contracts executed by the Administrator or Council directly or indirectly unless specifically authorized by Congress.

(h) The reservation under law of electric power for use in the State of Montana by reason of the construction of Hungry Horse and Libby Dams and Reservoirs within that State, plus 50 per centum of any electric power produced at Libby Reregulating Dam if built, is hereby affirmed. Electric power so reserved shall be sold at the rate or rates set pursuant to section 7.

EFFECTIVE DATE

SECTION 11. This Act shall be effective on the date of enactment, or October 1, 1980, whichever is later. The term "date of enactment of this Act" as used in this Act shall be either such date or October 1, 1980.

PURPOSE

One of the primary purposes of S. 885¹ is to allow the Pacific Northwest to resolve the competing claims to the Federal energy resources of the region and enable it to focus its attention on the task of developing an economical, adequate, efficient and reliable power system for the future.

¹S. 885 was approved by the Senate on August 3, 1979. Comparable, though not identical, measures referred to the Committee

Additional purposes include: the implementation and development of conservation and renewable energy programs; the establishment of a regional public planning process to enable all regional entities and the public at large to participate in the region's electrical energy decision making process; the protection, mitigation and enhancement of the fish and wildlife resources of the Columbia River and its tributaries; and the preservation of the authorities and responsibilities of non-Federal entities in the electrical energy field. It is not, however, a purpose of this legislation to interfere in any way with, or modify, the statutory rights of preference customers either within or without the region; nor is this legislation intended to be a precedent for any other region of the country.

BACKGROUND AND NEED

Formed in 1937, pursuant to the provisions of the Bonneville Project Act (16 U.S.C. 832; 50 Stat. 731), the Bonneville Power Administration (BPA) was given the authority to build and operate transmission facilities and dispose of electric power to be generated by the Federally constructed Bonneville Dam located on the Columbia River. BPA's authority has been statutorily expanded over the years so that today it transmits and markets the power generated at 30 Federal dams constructed by the Bureau of Reclamation (now the Water and Power Resources Service) and the Army Corps of Engineers located in the Pacific Northwest. At present, BPA markets over 50 percent of all the electricity consumed in its marketing area. This power is transmitted through a vast system of power lines built by BPA (80 percent of the region's high voltage transmission

on Interior and Insular Affairs included: H.R. 3508, by Mr. Ullman (for himself, Mr. Foley, Mr. McCormack, Mr. Duncan of Oregon, Mr. Hansen, Mr. Pritchard, Mr. Symms, Mr. AuCoin, Mr. Bonker, Mr. Dicks, Mr. Lowry, and Mr. Swift); H.R. 4137 and H.R. 4159, by Mr. Weaver; H.R. 5146, by Mr. Ullman; and H.R. 6677, by Mr. Swift.

lines are BPA's), and the dams and transmission system are collectively referred to as the Federal Columbia River Power System (FCRPS).

BPA has no express statutory authority to own, construct or purchase the output or capability of electric generating plants except to meet short term deficiencies. Its sole statutory duty is to market and transmit the power generated at Federal hydroelectric projects. Under a "regional preference and reciprocal act" (16 U.S.C. 837; 78 Stat. 756), BPA's marketing area is defined as including the States of Washington, Oregon, Idaho, and that part of Montana lying west of the Continental Divide. That Act also prohibits BPA from selling Federal power to entities outside the region if there is a demand for that power within the region, and affords similar regional priority with respect to other Federal projects outside the Pacific Northwest for sales to the Pacific Northwest.

The original Bonneville Project Act, like other Federal power marketing laws, contains a "preference clause". This clause requires that BPA, although statutorily authorized to sell power to all types of customers, must give first right and priority to that power to "public bodies and cooperatives". "Public bodies" are defined to include "States, public power districts, counties, and municipalities, including agencies or subdivisions of any thereof". If a shortage of power is contemplated, BPA's other customers must do without, in order that "public bodies and cooperatives" continue to receive the Federal power to which they are entitled.

The class of customers generally considered within the definition of "public bodies and cooperatives" is quite large and diverse. It is presently composed of 36 municipal utilities, 54 rural electric cooperatives, and 26 entities known as PUDs (Public Utility Districts in Washington and People's Utility Districts in Oregon) — a total of 116 "public bodies and cooperatives". These customers are collectively referred to as "preference customers" of BPA. BPA's present con-

tracts with these customers expire during the period from 1983 to 1994.

For a variety of reasons, preference customers proliferated in Washington while meeting with only limited organizational success in Oregon, Idaho, and western Montana. As a consequence, 57 percent of the residential consumers in Washington today are served by preference customers of BPA while only 21 percent, 18 percent, and 21 percent of the residential consumers in Oregon, Idaho and western Montana, respectively, are served by preference customers of BPA. Those consumers not served by preference customers are served by the seven investor-owned utilities of the region. These utilities are referred to as "IOU's".

During BPA's early years, the type of utility ownership serving an area was of little practical consequence. Because of the massive, preinflation era development of Federal dams in the Pacific Northwest, there was an abundance of low cost Federal hydropower, and BPA was able to meet the needs of its preference customers with substantial amounts of Federal hydro remaining. This surplus power was sold to the IOUs in the region and directly to aluminum and other electro-process industries which located in the region during the 1940's and 1950's because of the abundance of power. These industrial customers are directly served by BPA and, hence, are known as direct-service industrial customers or "DSIs". BPA's contracts with DSIs contain provisions whereby BPA can "interrupt" or curtail deliveries of power to the fifteen operating DSIs (six of which are aluminum companies) under a variety of operating and planning contingencies and therefore provide the region with valuable and necessary energy and capacity reserves. Together, the DSIs account for about one-third of BPA's firm and non-firm energy sales. BPA's present contracts with the DSIs expire during the period from 1981-1991.

By the mid-1960's, it became apparent that Federal hydropower abundance would soon come to an end. The Pacific Northwest had run out of economic and environmentally acceptable new sites for large scale, multi-purpose Federal hydroelectric projects. This, combined with projected increases in electrical energy consumption, indicated to BPA and others that additional non-Federal sources of power would soon be required to meet the needs of the region.

Faced with this perceived need, BPA, in cooperation with over 100 utilities in the region, embarked upon Phase I of the Hydro-Thermal Power Program. Under this program, BPA would continue to build the region-wide high voltage transmission system while the utilities in the region would be responsible for building and operating thermal (coal and nuclear) plants sized, located and scheduled to meet regional loads. To provide for the expansion of the region's power supplies and to reduce financing costs for preference customers building plants, BPA developed the concept of "net billing".

Under net billing, a preference customer of BPA agrees to pay a certain percentage of a thermal plant's annual costs in return for an equivalent percentage of that plant's output. The preference customer then assigns its percentage of project output to BPA and BPA credits the preference customer's monthly bill for other energy and services received from BPA with an amount equal to the preference customer's share of the monthly costs of the thermal plant.

In other words, the preference customer receives a monthly power bill from BPA "net" of its share of thermal plant costs. Once BPA receives the preference customer's share of the output of the thermal plants, it combines those resource costs with that of the Federal hydroelectricity, in keeping with normal utility rate-making practices, and sells the aggregate supply to all its customers, including the DSIs, at "melded" rates sufficient to recover all of the costs

of producing and transmitting both the thermal and Federal hydro.

Net billing allowed BPA to use its limited authority to acquire non-Federal power without obtaining direct statutory authority to purchase power on a long-term basis. Net billing was specifically approved in the reports accompanying the Public Works Appropriations Acts of 1970 and 1971, as Congress was kept apprised of progress of the Hydro-Thermal Program, although some have criticized the appropriateness of this kind of congressional authority.

Net billing was also supposed to reduce the costs of thermal plants built by preference customers since, under the net billing agreements, BPA was required to credit each preference customers' power bill with that customer's share of the thermal plant's cost, regardless of whether BPA actually received power from the plant. This shifted the risk of a failed plant, or "dry hole" as it is called, from the owner systems to all of BPA's customers in the region whose rates would be raised to compensate for the costs of the non-producing plant. This made revenue bonds sold by these preference customers to finance the thermal plants more secure. This, in turn, led to better bond ratings with lower interest rates and lowered overall construction costs.

The IOUs in the region did not participate in net billing, partly because BPA did not sell them any significant power to net bill against. Under Phase I, the IOUs were expected to build their own thermal plants to meet their load growth requirements and to replace the hydropower they had been receiving from BPA but would lose in 1973 when their 20-year power sale contracts with BPA expired. BPA could not renew the IOUs contracts because it estimated that it would need the power to serve preference customers, as mandated by the preference clause, and to serve the DSIs as required by their contracts still in effect. (The IOUs have not received any firm power from BPA since 1973. However, estimates in the late 1960's indicated that thermal

power costs would be only slightly higher than the cost of Federal hydro. Thus, the IOUs and their retail consumers were not expected to suffer severe cost impacts as a result of losing access to BPA wholesale power.)

The utilities in the region began to implement Phase I immediately. The IOUs began constructing their thermal plants and the preference customers, through a joint operating agency known as the Washington Public Power Supply System (WPPSS) began constructing the net billed plants. In addition, the utilities and BPA sought enactment of legislation which would allow BPA to operate on a "self-financed" basis, whereby BPA could directly apply its revenues to its costs and would be authorized to sell bonds to the U.S. Treasury to raise funds to construct additions to the regional transmission system. This legislation, which was eventually enacted in 1974 as the Federal Columbia River Transmission System Act (16 U.S.C. 838; 88 Stat. 1376), was intended to free BPA from the uncertainties of the appropriations process (though Congress retained considerable authority to disapprove any element of the BPA program) and to allow BPA to construct transmission additions on a timetable compatible with that of the thermal plants.

Phase I soon ran into trouble. First, the costs of the net billed plants began to rise, which would soon exhaust the net billing capability of the BPA System. Second, in 1973, the Internal Revenue Service issued regulations which effectively prevented further participation by BPA in net billing. Third, thermal plant cost escalation also struck the IOUs. This, in turn, forced the IOUs to raise their retail rates which, in many instances, meant that customers of IOUs would end up with higher retail rates (as much as 300% higher) than customers of preference customers of BPA. Rates of preference customers were also going to go up because of the cost escalations of the net billed plants, but these escalations would be mitigated somewhat for many years since the high cost net billed resources

were to be "melded" with a large block of quite low cost Federal hydro.

Faced with the limitations of Phase I, the utilities and BPA embarked upon Phase II of the Hydro-Thermal Power Programs in early 1974. Under Phase II, each class of utility agreed to build its own new generation (no net billing for preference customers) and the DSIs were to help make the plan economically feasible by providing a market for any excess power from Phase II projects. As before, BPA would provide certain transmission and other such services such as peaking and reserves. However, Phase II was killed before it got off the ground by a 1975 Federal District Court ruling requiring the preparation of an environmental impact statement on BPA's role in the regional power system. The delay associated with the preparation of the EIS and soaring construction costs created substantial power planning uncertainties for the region's utilities and DISs and, as a result, Phase II was scrapped.

The uncertainties caused by the demise of Phase II were compounded on June 24, 1976, when BPA, in furtherance of its belief that Federal power would not be adequate to meet the projected demands of its preference customers, issued Notices of Insufficiency to these customers. These notices had the legal effect of relieving BPA of liability for any failure to satisfy its preference customers load growth needs after July 1, 1983. BPA also informed its DSI customers that it would probably not be able to renew their power sale contracts when they expire in the period from 1981 to 1991 since it will need the energy "freed up" with the expiration of those contracts to meet the growing requirements of its preference customers, which, by virtue of the preference clause, have first right to it.

Additional power planning uncertainties arose on July 28, 1977, when legislation was enacted in the State of Oregon creating the Oregon Domestic and Rural Power Authority (DRPA). This legislation is intended to make the entire

State of Oregon a preference customer of BPA for the purpose of securing a pro rata share of Federal hydro sufficient to meet the total demands of Oregon domestic and rural consumers.

The impetus for DRPA can be traced back to BPA's early years. As was mentioned above, preference customers flourished in the State of Washington but not in Oregon, Idaho and western Montana. While all types of utilities (including IOUs in Oregon) were receiving low cost Federal hydro from BPA, this difference was of no consequence. However, since 1973, when BPA stopped selling power to IOUs, they have had to rely on (as it has turned out) increasingly expensive thermal power. Preference customers, on the other hand, still rely primarily upon low cost Federal hydro. Consequently, wholesale power costs to IOUs are usually higher than those faced by preference customers in the region. Since Oregon is primarily served by IOUs and Washington is primarily served by preference customers, consumers in Oregon (and Idaho and western Montana), on the average, pay more for their electricity at retail than those in Washington.

The State of Oregon has not been alone in its efforts to obtain access to the supply of Federal hydro. On November 14, 1977, the City of Portland, Oregon, filed two lawsuits against BPA in Federal District Court in Portland in an attempt to secure Federal hydro from BPA for the city, which is presently served by two investor-owned utilities. In addition, efforts are being made within the State of Oregon and elsewhere in the region to form new "public bodies and cooperatives" eligible to receive Federal hydro from BPA.

BPA, in recognition of the fact that the Federal resources available to it will be insufficient to meet the requirements of its existing preference customers after 1983, let alone the requirements of any new preference customers such as the Oregon Domestic and Rural Power Authority, began

the process of developing a policy for allocating the Federal power it sells and issued a proposed allocation policy in September, 1979. Under this proposal, existing and any new preference customers will be limited to a pro rata share of BPA power after 1991. Unfortunately, these shares will fall far short of meeting their requirements, especially if most of the DSIs become customers of the preference utilities upon the expiration of their present contracts with BPA or if new preference customer systems are formed. Before 1991, no BPA customer will be assured of getting its requirements met by BPA or certain in advance how much power it will be entitled to. Existing preference customers will, for the most part, be limited to supplies in accordance with their existing contracts, although they may be able to secure some indeterminate amount of additional power as the DSI contracts expire. New preference customers will divide up most of the power "freed up" by expiring DSI contracts, but the amount available to each will be impossible to determine in advance and will likely be insufficient to meet their needs.

It is clear that this allocation policy, once it is finalized and reviewed administratively within the Department of Energy, will be vigorously challenged in the Federal courts. The cost disparity between the Federal resources marketed by BPA, even with the tremendous cost escalations of the three net billed thermal plants presently under construction in the region factored in, and alternative sources of energy is too great for any of the potential claimants to the BPA supply — existing preference customers, the DSIs and potential new preference customers — to ignore. These challenges will undoubtedly be taken to the nation's highest court and could literally take years to resolve. The City of Portland lawsuits and potential lawsuits over the status of Oregon's Domestic and Rural Power Authority will only add to the complexity and length of these legal proceedings.

While these proceedings are being resolved, no utility or other claimant will know for certain how much of the

Federal power it will eventually be entitled to receive from BPA and, consequently, will not know what energy resources it should plan to develop for its own use. Unfortunately, current forecasts already show that the Pacific Northwest could experience serious power shortages during any critical water year in the 1980's. The delays associated with the above-mentioned power planning uncertainties will only exacerbate this existing power supply problem.

Available evidence indicates that the frequency and extent of these projected power shortages could be substantially reduced through the implementation of cost-effective conservation programs throughout the Pacific Northwest region. Unfortunately, it appears that the region presently lacks the means with which to undertake the necessary regional conservation effort. Legal and institutional constraints have limited the ability of individual utilities in this area. The ability of BPA to carry out these conservation programs is also limited since its authority to engage in these activities is minor and since it cannot borrow funds to finance their implementation. As a consequence, the Pacific Northwest is unable to "capture" the economic and power supply benefits available through the implementation of effective, region-wide conservation programs.

Many regional observers are of the opinion that the above-mentioned power planning and supply problems and the pending administrative/judicial battle over the allocation of the Federal hydroelectric resources in the Pacific Northwest can only be avoided through enactment of Federal legislation which: (1) lets the Congress decide which regional entities should have access to the Federal hydroelectricity marketed by BPA; (2) authorizes BPA to play a central role in the Pacific Northwest's electric energy decision making process; and (3) expands the authority of BPA to permit it to acquire additional resources on a long-term basis to meet the needs of the region. In addition, it is believed that such legislation can provide the institutional framework necessary for the implementation

of effective, region-wide conservation programs, allow the residential and small farm consumers of the region's non-preference utilities to share in the economic benefits of the Federal hydroelectric resources without impinging upon the protections provided to existing or new preference customers of BPA by the preference clause of the Bonneville Project Act, establish a workable public planning process, and facilitate the protection, mitigation, and enhancement of the region's fish and wildlife resources. Finally, it is felt that these legislative goals can be accomplished without adversely affecting other regions of the nation.

The power planning and supply uncertainties presently facing the Pacific Northwest, if left unresolved, could eventually lead to severe economic, social, and environmental disruptions throughout the region. Most parties agree that this type of Federal legislation, although providing for the expansion of BPA's authorities, properly recognizes the unique Federal presence in the Pacific Northwest without creating precedents for other regions and offers the only viable solution to the region's electrical energy problems.

EXPLANATION OF S. 885, AS RECOMMENDED BY THE COMMITTEE ON INTERIOR AND INSULAR AFFAIRS

The Committee on Interior and Insular Affairs adopted one amendment to S. 885 striking all after the enacting clause and inserting in lieu thereof the text of a substitute bill. The following explanation is of this Committee substitute and all references to "the bill", "the legislation", or "S. 885" in the explanation are to this Committee substitute.

The substitute recommended by the Committee on Interior and Insular Affairs contains a variety of provisions designed to enable the Pacific Northwest to solve the electric power planning uncertainties presently facing it, including these basic features: (1) The establishment of a

comprehensive public planning process; (2) a requirement that the Administrator of BPA offer new long-term power sale contracts to preference customers, Federal agencies, investor-owned utilities, and existing direct-service industrial customers of BPA; (3) a power exchange for the benefit of the region's residential and small farm consumers; (4) a grant of additional authority to the Administrator of BPA to require him to acquire on a long-term basis the resources necessary to meet his contractual requirements to his customers; (5) revised rate directives; (6) comprehensive energy conservation provisions; and (7) provisions for the protection, mitigation and enhancement of the fish and wildlife resources of the Columbia River and its tributaries.

Public planning process

The heart of the public planning provisions of this legislation is contained in section 4(a) which establishes an eight member Pacific Northwest Electric Power and Conservation Planning Council. The Council will be composed of two members from each of the States of Washington, Oregon, Idaho, and Montana and they will be appointed by their respective Governors in accordance with applicable State law. The Council members are to be considered employees of their respective States (not of the United States) and will be compensated and subject to removal in accordance with applicable State law.

The chief task of the Council will be to prepare, adopt and periodically review and revise, after public hearings and participation, a regional conservation and electric power plan primarily for the purpose of guiding the Administrator in the exercise of the resource acquisition authorities granted him by section 6 of this legislation (sec. 4(d)). Pursuant to section 4(e)(2), the plan must set forth a general scheme for the implementation of the Administrator's conservation and resource development authorities pursuant to section 6 with due consideration by the Council

of environmental quality, compatibility with the existing power system, protection, mitigation and enhancement of fish and wildlife and other appropriate criteria. In addition, under section 4(e)(1), the plan must give the following priority to cost-effective resources the Administrator may implement or acquire: (1) conservation; (2) renewable resources; (3) resources utilizing waste heat or having high fuel conversion efficiency; and (4) all other resources. Section 4(e)(3) sets out the specific elements to be included in the plan. As more fully described below, the plan must also contain provisions relating to model conservation standards and fish and wildlife protection, mitigation and enhancement measures.

In addition to the public participation and input which will come about as a result of the preparation and adoption of the regional plan, the bill facilitates public input and knowledge by requiring, in section 4(g), that the Council and the Administrator inform the public on major regional power issues, obtain their views on such issues, and secure the advice and consultation of the Administrator's customers and others.

New long-term power sale contracts

Provisions governing power sales by BPA are contained in Section 5 of S. 885.

Specifically, section 5(b)(1) requires the Administrator, if requested, to enter into long-term power sale contracts with both preference and investor-owned utilities in the region to supply them with the firm power they need to meet their firm loads in the region to the extent they cannot meet their own loads with their own resources. The practical effect of this mandate is that: (1) preference utilities, whose current loads are now almost entirely met by BPA, will continue to have all of their firm power needs in the region met by BPA, and (2) investor-owned utilities, which already own most of the resources necessary to meet their

existing loads, will receive from BPA the power needed to meet their firm load growth requirements within the region. Section 5(d)(1) of the bill authorizes the Administrator to sell power to its existing direct-service industrial customers and requires him to offer to such customers initial long-term power sale contracts that provide them with amounts of power equivalent to that provided them under their existing contracts with BPA; however, sales to new DSI customers are expressly prohibited (sec. 5(d)(2)). These new DSI contracts must continue to provide reserves for the region. Finally, section 5(b)(3) authorizes BPA to sell power to Federal agencies in the region.

Pursuant to section 5(g), the Administrator is required to offer all of these customers initial long-term contracts.

As more fully described below, section 6 of S. 885 requires the Administrator to acquire on a long-term basis sufficient resources, including conservation, necessary to fulfill his contractual obligations to his customers. However, the legislation recognizes that these resource acquisition authorities may prove to be inadequate and therefore requires the Administrator to include in contracts with utility and Federal agency customers provisions permitting him to restrict his obligations to meet the full requirements of such customers in the future if he determines, after a reasonable period of experience under this legislation, that he cannot be assured on a planning basis of being able to acquire the necessary resources (sec. 5(b)(5)).

It is anticipated under this legislation that each BPA customer group will provide BPA, through the acquisition procedures of section 6, with sufficient power to meet each such customer group's load requirements. Section 5(e) of S. 885 will encourage these customer groups to actually provide BPA with such resources since it provides that customers will not be restricted pursuant to section 5(b) below the amount of power that they have provided BPA pursuant to section 6.

Section 5 of S. 885 also contains provisions designed to insure that preference customers of BPA continue to have supply preference to the amount of resources to which the preference clause applies. The most significant of these is section 5(a) which provides that all power sales by BPA pursuant to this legislation "shall be subject at all times to the preference and priority provisions of the Bonneville Project Act of 1937. . . . and, in particular, sections 4 and 5 thereof." In addition, section 5(b)(6) prohibits the Administrator from imposing restrictions on preference customers and Federal agencies if such restrictions would reduce the total contractual entitlement of such customers to an amount less than the amount of power to which the preference clause applies — the Federal base system resources. Taken together, these and other provisions of section 5 will make certain that all preference customer contract requirements will continue to have a priority over BPA sales to other customers.

Residential power exchange

Section 5(c) of S. 885 contains provisions for a residential power "exchange". Under these provisions, any utility in the region would be entitled to sell to BPA an amount of power equal to the utility's residential and small farm load at the "average system cost" of such power and BPA would be required to sell back to each such utility an equivalent amount of power at a rate identical to what preference customers pay BPA for power to meet their "general requirements" (subject to a "rate ceiling").

Although this exchange is technically available for use by any utility in the region, including preference utilities, it is anticipated that the region's investor-owned utilities will make primary use of it. This exchange will allow the residential and small farm consumers of the region's IOUs to share in the economic benefits of the lower-cost Federal resources marketed by BPA and will provide these consumers wholesale rate parity with residential consumers

or preference utilities in the region. Customers of preference utilities will not suffer any adverse economic consequences as a result of this exchange since, as discussed below, the direct-service industrial customers of BPA are required to pay the costs of the exchange during its initial years while a "rate ceiling" protects the customers of preference utilities during later years.

The cost benefits of any exchange are required under section 5(c)(3) to be passed directly through to the appropriate residential and small farm consumers. In addition, section 5(c)(2) requires that the amount of power permitted to be exchanged must be "ramped" in, beginning at 50 percent of the utility's residential and small farm load in 1980 and increasing to 100 percent of such load in 1985.

Authority to acquire resources

Section 6 of the legislation authorizes and requires the Administrator of BPA to acquire on a long-term basis sufficient resources, including conservation, to meet his section 5 contractual obligations to his customers. This resource acquisition authority, by providing the Administrator with the ability to expand the energy resource pool available to him, allows the Administrator to enter into the long-term power sale contracts with preference and investor-owned utilities, Federal agencies and existing direct-service industrial customers and obviates the need for him to administratively allocate the limited amount of Federal resources among existing and potential claimants to it. Thus, the Pacific Northwest will be able to avoid the power planning and supply uncertainties inherent in such an administrative allocation of over one-half of the region's electrical energy resources.

Specifically, section 6(a) of S. 885 requires BPA to: (1) acquire all conservation resources and renewable resources installed by residential and small commercial consumers, and (2) implement all conservation measures, including loans and grants for insulation and weatherization, which

are determined to be consistent with the plan developed by the regional Council pursuant to section 4 or, if no plan is in effect, consistent with sections 4(e)(1) and (2). Section 6(b) requires BPA to acquire sufficient resources to meet its contractual obligations, after taking into account planned savings from measures provided for in section 6(a), which are determined to be consistent with the plan, or, in the absence of a plan, with sections 4(e)(1) and (2). Section 6(c) sets out additional procedural requirements which must be met in the case of any "major" resource acquisition proposal. These requirements include detailed notice, hearing and decision-making procedures and a requirement that any major resource acquisition proposal found to be inconsistent with the plan or, in the absence of a plan, with sections 4(e)(1) and (2) must be specifically authorized by Act of Congress.

The authority to acquire resources under section 6 will not permit BPA to construct or own any generating facility; rather, it will permit BPA to purchase the output or, to reduce unnecessary costs of resources not yet constructed, the capability of resources owned and operated by other entities in the region.

Revised rate directives

Section 7 of the legislation sets out the requirements BPA must follow when fixing rates for the power sold its customers under this legislation. Subject to the general requirement (contained in section 7(a)) that BPA must continue to set its rates so that its total revenues continue to recover its total costs, BPA is required by the legislation to establish the following rates:

A. The lowest rates will be reserved for the normal loads ("general requirements") of preference utilities and for the power sold to utilities under the section 5(c) exchange provisions for service to their residential and small farm loads (sec. 7(b)(1)).

B. A higher rate will apply to the load growth of the region's investor-owned utilities and for the power needed by preference utilities to meet any "new large single loads" they may have (sec. 7(f)).

C. The direct-service industrial customers of BPA will pay rates prior to 1985 sufficient to cover the cost of resources required to serve them plus the otherwise unrecovered cost of the section 5(c) exchange power. After 1985, the direct-service industrial customers rates will be based on the retail industrial rates charged by BPA's preference utility customers (sec. 7(c)). In essence, the DSIs by paying these higher rates make it possible for the residential and small farm consumers served by the region's investor-owned utilities to share in the economic benefits of the Federal resources without increasing power costs for preference utilities and their customers.

As an added protection against preference utilities and their customers suffering adverse economic consequences as a result of this legislation, section 7(b)(2) establishes a "rate ceiling" which is hypothetically intended to insure that these customers' rates will be no higher than they would have been had the Administrator not been required to participate in power sales or purchase transactions with non-preference customers under this legislation.

Energy conservation provisions

S. 885 contains a variety of comprehensive and inter-related energy conservation provisions designed to encourage and achieve cost-effective conservation within the Pacific Northwest.

As was noted above, section 6(a) of the legislation requires the Administrator of BPA to implement all conservation measures and acquire consumer-installed renewable resources as are cost-effective, through a variety of measures including loans and grants to consumers for insulation and

weatherization. Section 6(b) permits the Administrator to acquire other resources to meet his contractual obligations but only after taking into account planned conservation savings under section 6(a). (The section 3(4) definition of "cost-effective" also gives conservation measures a 10 percent advantage over all other resources.) Thus, sections 6(a) and (b) together require the Administrator to achieve all available conservation and prevent him from acquiring non-conservation resources without first taking into account planned savings from conservation.

Section 4(d) requires the preparation of a regional electric power and conservation plan in which conservation would have first priority. This plan would consist of, among other things, an energy conservation program including model conservation standards applicable to electrical energy consuming activities. Under section 4(f), surcharges of from 10 percent to 50 percent on BPA rates could be assessed customers or jurisdictions which do not implement the standards or achieve comparable energy savings. Thus, the bill directly encourages the use of authorities by State and local governments to achieve energy conservation.

Section 6(h) requires the Administrator to pay billing credits (reductions in customer's bills) for customer conservation activities independently undertaken which reduce the demand on BPA. This provision is expected to induce local utility initiative to reduce energy demand. In addition, retail rate structures which reduce demand would qualify for such credits under section 6(h)(5).

Finally, section 8(d) increases BPA's borrowing limit to establish a \$1¼ billion revolving fund for conservation and renewable resource loans and grants. This authority would help finance the conservation actions authorized by section 6(a) and other provisions of the bill and would be supported solely by BPA revenues.

Fish and wildlife provisions

This bill provides, primarily through section 4(h), a mechanism agreeable to both the power and fisheries interests in the Pacific Northwest for developing a comprehensive program to protect, mitigate and enhance fish and wildlife resources affected by the hydroelectric facilities on the Columbia River and its tributaries. The bill creates a forum for the resolution of conflicts between fisheries and power interests on this unique and complex river system, and provides a means for funding the fish and wildlife provisions adopted as part of the program. Although this approach is not intended to create any new obligations with respect to fish and wildlife, it will provide a system for insuring that existing fish and wildlife obligations are fulfilled while simultaneously assuring the region an economical and reliable power supply. This approach should work extremely well on the Columbia River and its tributaries without creating an adverse precedent for either fisheries or power interests in other regions of the country.

Specifically, section 4(h) requires the Council to promptly develop a comprehensive program of fish and wildlife measures based on recommendations of the region's fisheries agencies, utilities and others. The section sets out specific criteria such recommendations must meet in order to be included in the program. Once developed and adopted, the program will be incorporated into the regional electric power and conservation plan, but will also exist independently of the plan. BPA is authorized to use its power revenues and borrow from the Treasury for the purpose of implementing the program. Other Federal agencies, whose existing authorities are not changed by this legislation, are required to take the fish and wildlife program into account in exercising their independent statutory responsibilities. Finally, although section 4(h) does not apply to rivers in the region other than the Columbia River and its tributaries, the fish and wildlife resources on those other rivers will be protected under this legislation through other provisions

designed to minimize environmental impacts generally in the implementation of this Act.

This legislation does not itself authorize any appropriation of water for fisheries purposes; all actions of other Federal agencies, including actions to assist fish migration, must be taken under other authorities. The goal of the program is not to increase the obligations of water project owners and operators, but rather to go beyond a project-by-project approach on a river system whose multiplicity of projects and interdependent biological species makes a project-by-project approach unsatisfactory for all involved parties.

SECTION-BY-SECTION ANALYSIS OF S. 885, AS RECOMMENDED BY THE COMMITTEE ON INTERIOR AND INSULAR AFFAIRS

SECTION 1 — *Short title and table of contents*

This section provides the short title, the "Pacific Northwest Electric Power Planning and Conservation Act" and a table of contents.

SECTION 2 — *Purposes*

This section establishes purposes of the bill that emphasize both the uniqueness and the multi-purpose character of the Pacific Northwest's power supply system in general and the Federal Columbia River Power System in particular. These purposes, which are given substantive effect through other provisions of the bill, are to be consistent with one another and with other laws.

SECTION 3 — *Definitions*

This section contains definitions of terms used throughout this legislation.

Section 3(1) defines "acquire" and "acquisition" to make clear that use of these terms in this bill does not authorize BPA to own or construct generating facilities.

Section 3(2) defines "Administrator" as the Administrator of BPA.

Section 3(3) defines "conservation" as a reduction in electric power consumption resulting from increases in efficiency in energy use, production or distribution.

Section 3(4) defines "cost-effective" for purposes of regional power planning and resources acquisition. The definition essentially requires a full marginal cost comparison among alternatives such as conservation and generating resources, and specifies the basis of such comparisons. This definition insures that decommissioning costs and projected increases in fuel costs are specifically included in the estimate of the direct costs of a resource.

The Committee intends that the appropriate historical experience with similar resources shall be the starting point in determining the estimated amount of power that particular types of resources may produce, and that those who contend that such estimates should reflect other factors (e.g., technological improvements) should have the burden of demonstrating the appropriateness of such factors.

Section 3(5) defines "consumer" as an end user of electric power, as distinct from a wholesaler of electric power such as a utility.

Section 3(6) defines "Council" to mean the regional council contemplated under section 4.

Section 3(7) defines "customer" as anyone who purchases power from BPA. Thus, direct-service industries are "customers" as well as "consumers" for purposes of this bill; utilities are "customers" only.

Section 3(8) defines "direct service industrial customer" as an industrial customer that purchases power from BPA.

Section 3(9) defines "electric power" to mean electric peaking capacity or electric energy, or both. This definition already applies to BPA through the Federal Columbia River Transmission System Act, and avoids the need to use the terms "peaking capacity" and "energy" throughout the bill except where the distinction is necessary and made.

Section 3(10) defines "Federal base system resources" to include existing and future Federal hydro projects, resources acquired by BPA under existing contracts, and resources acquired as replacements therefor. This defined term is used in several of the bill's provisions that protect the preference rights of public bodies and cooperatives.

Section 3(11) defines "Indian tribe" in a manner consistent with the definition used in similar resource management laws.

Section 3(12) defines "major resources". The definition includes a size limit (fifty average megawatts), since the bill draws substantive and procedural distinctions between major and non-major resources. The definition also includes, in the case of resources acquired by BPA, a durational criterion (more than five years), since BPA is already authorized under the Federal Columbia River Transmission System Act to make short-term purchases (five years or less) to meet its contractual obligations.

Section 3(13) defines "new large single loads", a term with rate consequences under sections 5(c) and 7(b) of the legislation. Under this definition, September 1, 1979, is the "cut-off" date for all categories of new large single loads; no cut-off date distinction is made between industrial and non-industrial loads of this type. Thus, a large single load of a utility is a "new large single load" if it was not contracted for or committed to by that utility prior to such date.

Section 3(14) defines "Pacific Northwest", "region" or "regional".

Section 3(15) defines "plan" to mean the regional electric power and conservation plan to be developed by the Council under section 4 of the legislation.

Section 3(16) defines "renewable resource", and includes not only generating resources using a renewable source of energy but also resources that reduce consumer power needs through direct application such as solar hot water systems. "Breeder" or "fusion" projects cannot qualify as renewable resources under this definition.

Section 3(17) defines "reserves", which represent power available to protect firm loads from various shortage or operating situations. BPA obtains a portion of its power system reserves through rights to curtail power deliveries to direct-service industries; the term is also used in section 6(h) with respect to calculation of billing credits for BPA's customers.

Section 3(18) defines "residential use" and "residential load", a term that determines the amount of power a utility may exchange with BPA under section 5(c). This term includes all normal residential loads along with the first four hundred horsepower during any monthly billing period of farm irrigation and pumping for any farm. This limit recognizes the higher lift distances and different soil conditions in areas east of the Cascade mountains.

Section 3(19) defines "resource" to mean either electric power (including actual or planned capability of generating resources) or reductions in load (including actual or planned savings from conservation measures and direct-application renewables). Conservation is therefore a resource for purposes of this bill. The definition also helps make clear, as does section 3(1), that if BPA acquires a resource,

it does not become the owner of an electric generating facility.

Section 3(20) defines "Secretary" to mean the Secretary of Energy.

SECTION 4 — *Regional planning and participation*

Section 4(a)(1) through (3) establishes an eight member Pacific Northwest Electric Power and Conservation Planning Council which will be considered formed upon the appointment of six members. The Governors of Idaho, Montana, Oregon, and Washington, subject to applicable State law, may each appoint two members to the Council from their respective States. Applicable State authorities and appointing actions of the States constitute their agreement to the exercise by the Council of its functions under this legislation, to which the Congress consents. The arrangement contemplates that State officials on the Council would be authorized to carry out their functions under State law consistent with the scheme of the bill. Council members are deemed to be employees or officers of their respective States, and are subject to removal pursuant to, and compensated in accordance with, applicable State law.

The Committee notes that the Appointments Clause of the United States Constitution has been raised as a possible impediment to gubernatorial appointment of these Council members. However, the Committee believes that the Constitution allows the Congress, through the broad powers it possesses under the Commerce and Property Clauses of the Constitution, to share with the States the type of responsibilities granted to the Council by this legislation and that the Appointments Clause does not prevent an interstate arrangement such as this where the Congress expressly consents to share responsibility with the States in an area of mutual, rather than purely Federal, responsibility. Energy planning is interstate in character, particularly in the Pacific Northwest where the four States and the Federal Government are bound together by their shared interest in,

and mutual dependence upon, an integrated regional power system.

The Committee believes that gubernatorial appointment of Council members will most fully carry out its intent to establish an effective regional power and conservation planning council to assure maximum regional cooperation in energy planning and to help guide the new authority granted to BPA by this legislation. The Council arrangement also permits early State involvement in energy planning, to complement those State authorities reserved by section 10, and to recognize the shared State and Federal authorities in energy planning and regulation that would continue under this Act. In addition, the Committee understands that the size, composition and functions of the Council as set out in this section and section 6 are uniquely acceptable to the major participants in regional discussions concerning these issues.

Section 4(a)(4) provides for a temporary Federally-appointed Council in the event that the State-appointed Council is unable to be formed or is found to be unable to perform its functions by a Federal Court of Appeals.

Under this provision, the Secretary of Energy would appoint two Council members from each State in a manner designed to assure continuity and prevent disruption of the Council's activities. Because this Federal appointment is intended to assure continuity, the Committee would encourage the Secretary to consider appointing those members already serving for the respective States or recommended by the appropriate Governors in the event that this provision becomes effective.

Members so appointed would serve until the Council terminated or until the defect that caused the State-appointed Council to fail was corrected by the States or the Congress, as appropriate. If the defect is not cured, the Federally-appointed Council would terminate at the end

of the second full Congress following the Secretary's first appointment, unless extended by Congress.

The Secretary is required to submit to the Congress, in consultation with the Governors, recommended legislation that would cure the defect that caused the State-appointed Council to fail and would once again permit State appointment.

In the event that the Council terminates after inaction by the Congress, the Administrator would not be able to acquire a major generating resource or to grant a billing credit involving a major generating resource until the expenditure of funds for that purpose had been specifically approved by the Congress.

As was noted above, the Committee believes gubernatorial appointment of Council members will most fully carry out its intent to establish an effective energy planning mechanism for the Pacific Northwest and that the Appointments Clause does not bar its formation or operation. However, in the event that a United States Court of Appeals determines that this type of arrangement is constitutionally infirm, in whole or in part, the Committee hopes that whatever relief is prescribed be as narrow as possible, with an eye towards preserving this Committee's essential objective, the perpetuation of regional energy planning substantially as envisioned in section 4. For instance, should such a court determine a particular, but not necessarily key activity to be unconstitutional, the Committee suggests that such responsibility alone be suspended and the larger planning scheme be allowed to function. Because of the urgent needs this legislation is designed to address, the Committee does not intend that this entire Act should fall on the basis of any judicial ruling if such a result can possibly be avoided.

Section 4(a)(5) sets out the requirements for voting by the Council. Under this section, either a simple majority, as long as the majority includes at least one member from

each State, or six votes, even though both members of a particular State vote "no", are required for adoption and amendment of the regional conservation and electric power plan. These voting requirements should adequately protect individual States and facilitate development of the regional plan upon which the entire conservation and resource program envisioned by the bill depend while at the same time avoiding the disruption possible if complete unanimity among the States was required for the adoption of the plan.

Section 4(a)(6) provides for selection of a Council Chairman from among its members, and specifies the procedures for calling meetings and for the submission of dissenting or additional views by any Council member.

Sections 4(a)(7) through (11) provide for appointment of Council staff; authority to request personnel from Federal agencies on a reimbursable basis; reliance, to the greatest extent practicable, on customers of the Administrator and other regional entities for expert and technical information; Council determination of its procedures and public access thereto as well as to its annual work program budget; provision to the Council by the Administrator and other Federal agencies of relevant information requested by it; and other administrative responsibilities and authorities of the Council.

Section 4(a)(12) directs the Administrator at the request of the Council to provide financial support for the performance of the Council's functions and to the States that have appointed members to the Council for their participation in, and activities related to, the Council.

Section 4(b) directs the Council to establish a voluntary scientific and technical advisory committee and authorizes the establishment of such other voluntary advisory committees as it deems necessary.

Section 4(c) directs that these Council advisory committees shall be composed of, and rely upon, to the greatest

extent feasible, the various Federal, State and Tribal governments, consumer groups and customers whose interests are affected by the committees. The committee intends that such committees shall be manageable in terms of total size and composition.

Section 4(d) sets out the Council's primary responsibility, to prepare and adopt within two years a regional conservation and electric power plan and to review and amend, if necessary, the plan at least once every five years. Public legislative type hearings are required to be held before adoption of the plan or substantial, nontechnical amendments to it.

Section 4(e)(1) directs that the plan give priority to resources that the Council determines to be cost-effective as follows: first, to conservation; second, to renewable resources; third, to generating resources utilizing waste heat or having high fuel conversion efficiency; and fourth, to all other resources.

Section 4(e)(2) requires that the plan shall set forth a general scheme for implementing conservation measures and developing resources pursuant to section 6 with due consideration to environmental quality, compatibility with the existing regional power system, protection, mitigation and enhancement of fish and wildlife, and other relevant criteria.

Section 4(e)(3) sets out the following specific elements that will be included in the plan: (1) an energy conservation program, including model conservation standards; (2) recommendations for research and development; (3) a methodology for determining "quantifiable environmental costs" under section 3(4); (4) a 20-year demand and resource forecast; (5) an analysis of cost-effective methods of providing reserves; (6) the fish and wildlife program adopted pursuant to section 4(h); and (7) a methodology for calculating model conservation surcharges, if recom-

mended. This section makes it clear that only these elements will be included in the plan and that the Council has full discretion to determine the amount of detail that is appropriate for each element in the plan.

Section 4(e)(4) requires the Council to study conservation measures reasonably available to direct service industrial customers and other major consumers of electric power. The study shall include an analysis of financial assistance that might be necessary and available to permit particular conservation measures to be implemented. This study is not required to be part of the plan.

Section 4(f)(1) describes the model conservation standards that are to be included in the plan. These standards are to be designed to produce all power savings that are cost-effective for the region and economically feasible for consumers through financial assistance made available under this legislation. Consumers will therefore bear the cost of conservation measures that are cost-effective in terms of the electric rates consumers pay, while the cost of the additional increment of conservation that is cost-effective to the region will be met through financial assistance that BPA is required to provide under section 6(a).

Section 4(f)(2) describes the surcharge that the Council may vote to recommend that the Administrator impose on customers for those portions of their loads within States or political subdivisions which have not, or on customers which have not, implemented conservation measures that achieve energy savings that the Administrator determines are comparable to those which would be obtained under the model conservation standards established pursuant to this section. These surcharges shall not be less than 10 percent nor more than 50 percent of the Administrator's applicable rates for such land or portion thereof.

Section 4(g) directs the Council and the Administrator to undertake measures to insure wide-spread public involvement in the formulation of regional power policies and re-

quires the Council and the Administrator to take into account State and local elections in the region that bear on regional power policies.

Section 4(h) contains detailed provisions concerning the protection, mitigation and enhancement of fish and wildlife on the Columbia River and its tributaries and incorporates the recommendations proposed by an ad hoc committee of Federal, State and Tribal fisheries agencies, Federal power and water management agencies, and BPA customers.

Section 4(h)(1)(A): This subparagraph requires the Council to develop a unified program for the protection, mitigation and enhancement of fish and wildlife on the Columbia River and its tributaries. This provision recognizes that the history, problems and opportunities of the Columbia River system are unique, making such a program suitable and desirable for this particular river system but not for other rivers or systems in or out of the Pacific Northwest region. The provision therefore contains a non-applicability clause to ensure that the type of program contemplated by this legislation is not a precedent for other areas.

Section 4(h)(1)(B): This subparagraph requires the Council, as a first step in developing the program, to request promptly from the relevant fish and wildlife agencies their recommendations for (i) measures to protect, mitigate and enhance fish and wildlife affected by the hydroelectric projects of the Columbia River system, (ii) objectives for development and operation of such projects in a manner that will protect, mitigate and enhance fish and wildlife, and (iii) management coordination, research and development, and funding that will aid protection, migration and survival of anadromous fish. It is anticipated that because of the importance of non-firm power sales outside the Pacific Northwest and the opportunity value of such sales, at least some of these recommendations will explore alternative methods by which fish migration can be improved without unnecessary spillage of water.

Section 4(h)(1)(C)(i) established the procedure for the Council's solicitation of recommendations relating to protection, mitigation and enhancement of fish and wildlife.

Section 4(h)(1)(C)(ii) provides procedures for making the received recommendations and comments available to all relevant parties and the public, and for conducting hearings and otherwise ensuring public participation and comment on the recommendations.

Section 4(h)(1)(C)(iii) requires the Council to develop the program on the basis of the recommendations, comments and information received. The program is to consist of measures that protect, mitigate and enhance fish and wildlife affected by the Columbia River system while satisfying the power supply purposes of the Act. Enhancement measures that are designed to achieve protection and mitigation and that meet the criteria of Section 4(h) are to be included in the program. The latter statement helps clarify that in this context enhancement is not a new or additional obligation, but a means of fulfilling existing protection and mitigation obligations under the unique circumstances presented by the Columbia River power system.

Section 4(h)(1)(C)(iv) sets substantive criteria for measures included in the program. The criteria include: (1) complementary with other related efforts; (2) scientific support; (3) minimization of cost, not absolutely but for any given biological objective; (4) consistency with the legal rights of Indian tribes; and, in the case of anadromous fish, (5) provision for improved survival of such fish at hydroelectric facilities; and (6) provision for flows between such facilities to improve production, migration and survival of such fish as necessary to meet the sound biological objectives.

Section 4(h)(1)(C)(v) requires the Council to determine whether each recommendation is consistent with the pur-

poses of the Act, and to reconcile inconsistencies among individual recommendations in order to create an internally consistent program. The Council may decline to include a recommendation in the program only if that recommendation is (1) inconsistent with the purposes of the Act, (2) inconsistent with standards established for the program, or (3) less effective than an adopted recommendation in achieving protection, mitigation and enhancement.

Section 4(h)(1)(C)(vi) contains additional principles to guide the Council in developing the program. These include:

1. The use of enhancement as a tool for achieving off-site protection and mitigation (in appropriate circumstances), not as an additional obligation.
2. Consumers of electric power should bear only those costs attributable to electric power facilities and programs (but not the cost of measures designed to deal with impacts caused by other factors).
3. Monetary costs and power losses resulting from implementation of the program are to be allocated among projects, both Federal and non-Federal, in accordance with the relative impacts of individual projects and with system-wide objectives.
4. While the program shall include directly only those measures needed to deal with impacts caused by power facilities and programs, it may be integrated with similar efforts dealing with other impacts (or additional enhancement) to the extent the administration and funding of such additional efforts are provided through other provisions of law or ancillary agreements.

Section 4(h)(1)(C)(vii) sets a time limit for adoption of the program by the Council, requires the program to be included in the Council's regional power and conservation plan adopted pursuant to section 4(d), and provides for

judicial review of the Council's actions in adopting the program. The intent is that the program may exist independently of the regional plan, as well as being incorporated into that plan as one of the plan elements.

Section 4(h)(2)(A): This subparagraph requires BPA to use its funding authorities (i.e., borrowing and, potentially, appropriations) to protect, mitigate and enhance fish and wildlife to the extent such resources are affected by the hydroelectric projects of the Columbia River and its tributaries. (Section 8(b) provides BPA's authority to pay the costs of all acquired resources regardless of location, including fish and wildlife protection costs.) In doing so, BPA shall act consistently with the regional plan, the program developed under this subsection, the purposes of this Act and other provisions of law. BPA expenditures shall be in addition to, not in lieu of, other expenditures authorized or required to be made by other entities under other agreements or provisions of law. Other fisheries efforts outside this Act, for example, are expected to continue and to be funded separately.

Section 4(h)(2)(B): This subparagraph requires BPA to include proposed expenditures under this subsection in its budget submittals to Congress, and, in the case of major expenditures, to obtain approval in the same manner as is currently required for major transmission system additions.

Section 4(h)(2)(C): The allocation of particular costs to individual projects and among different project purposes, as is required by existing law, is preserved in this subparagraph to avoid establishing any precedent of a different allocation result. Thus, power, irrigation, navigation, recreation and other project purposes will continue to bear only their established shares of the total costs attributable to protection and mitigation measures. All expenditures by BPA are to be made on a reimbursable

basis vis-a-vis other project purposes, although BPA will have the flexibility to treat expenditures in excess of its allocated share as being payments for other project costs for which BPA is responsible under existing law.

Section 4(h)(3)(A): This subparagraph requires all Federal agencies with responsibilities for hydroelectric facilities on the Columbia River system to do two things. First, such agencies must exercise their responsibilities (in coordination with one another, and consistently with the purposes of this and other laws) to protect, mitigate and enhance fish and wildlife in a manner providing equitable treatment for such fish and wildlife relative to the other purposes for which the Columbia River system and facilities are managed and operated under other provisions of law.

Second, such agencies are required to take into account to the fullest extent practicable the program adopted under this subsection when they exercise their responsibilities. This provision does not change the existing statutory authority of other Federal agencies such as the Corps of Engineers or FERC. It does require them, in the interest of coordination, to recognize BPA's obligations under this and other laws and to take into account, at each relevant stage of their own decision-making (pursuant to existing processes), the decisions embodied as measures in the Council's fish and wildlife program. If such agencies reject the implementation of any measure contained in the program, they should indicate in writing the basis for that decision so that all parties will have a basis for understanding the decision.

Subparagraph 4(h)3(A) also requires the Administrator to reimburse non-Federal projects for monetary costs of power losses to the extent program measures not attributable to those projects themselves are imposed upon the projects as a result of the consideration given the program by other agencies (e.g., FERC).

Section 4(h)(4) requires reports to Congress by the council and the Administrator on the fish and wildlife program.

Section 4(h)(5) provides a means of ensuring that the program contemplated in this subsection is developed in timely fashion, even should the Council itself be delayed in formation or proven unable to function.

Section 4(i) requires the Administrator and Council to consult with BPA customers and to recognize and not abridge the authorities of State and local governments, electric utility systems, and other non-Federal entities responsible for power supply.

Section 4(j) requires the Council and the Administrator to encourage the cooperation and participation of appropriate Federal, State, local and Tribal entities in the preparation, adoption and implementation of the regional plan.

SECTION 5 — *Sale of power*

Section 5(a) makes clear that all power sales under this bill are subject at all times to the Bonneville Project Act, particularly sections 4 and 5 of that Act. This provision therefore retains the preference and priority accorded public bodies and cooperatives in BPA power sales. Related preference protecting provisions include sections 5(b), 7(b) and 10(c).

Section 5(b)(1) requires BPA to offer to sell to each requesting utility the power needed by the utility to meet its firm load within the region in excess of the utility's own firm resources, and specifies the method of determining the utility's own firm resources. This section also clarifies that firm energy and firm peaking resources of a utility may differ and that the firm energy associated with the firm peaking component of a resource is the firm energy produced in the peaking use of that resource.

Section 5(b)(2) reaffirms the provisions of the Bonneville Project Act that BPA must be able to reduce its obligations to investor-owned utilities upon five years notice. The Committee does expect, however, that BPA can and should be able to provide a long notice period to these utilities to the extent practicable to facilitate orderly planning by these utilities.

Section 5(b)(3) authorizes BPA to sell power to Federal agencies in the region. Although Federal agencies are not preference customers, some have long depended on BPA for power, and it is intended that BPA continue to serve these agencies.

Section 5(b)(4) requires that BPA sales under this subsection be made, as they are today, only to entities meeting BPA's standards for service. This ensures that BPA will not be required to serve technologically unprepared or unsuitable customers.

Section 5(b)(5) continues the requirement of the Bonneville Project Act that BPA include in its contracts with utilities provisions permitting BPA to restrict its contract obligations to meet such customer's full requirements during any period of insufficiency. The subsection requires a reasonable period of experience under this Act prior to BPA's giving notice of a period of insufficiency, and also a reasonable notice period before any restriction becomes effective for preference customers and Federal agency customers. This subsection deals with restriction of contract obligations on a planning basis for future periods, not actual power deliveries during an operating shortage, since actual operating curtailments for utilities are imposed by State and local governments, not BPA.

Section 5(b)(6) specifies that the total contractual entitlements of preference customers and Federal agencies during any period of insufficiency shall not be less than

the total firm capability of the Federal base system resources. This is to protect preference. In order to aid planning by such customers, the subsection requires that the contract formula for allocating entitlements during any such period shall be on a uniform basis, and shall disregard resources of such customers other than those dedicated to their firm loads prior to the effective date of this Act. The subsection also makes clear that the actual contract entitlement of any such customer shall not exceed that customer's actual net requirements during any period of insufficiency.

Section 5(c) permits power exchanges between BPA and Pacific Northwest utilities for the benefit of residential and small farm consumers. The cost benefits of such exchanges are required to be passed through directly to the residential and small farm consumers themselves. Exchange agreements may be terminated by the utility under specified circumstances, and upon reasonable terms and conditions agreed in advance, but during any period of insufficiency a utility's entitlement under this section shall not be less than the amount of power BPA acquires from or on behalf of such utility under this section. The rate BPA pays for power so acquired shall be based on an "average system cost" methodology BPA develops in consultation with the Council, BPA customers and appropriate State regulatory bodies; the methodology is subject to review by FERC under this section and section 9(g). Paragraph (7) specifies certain costs that must be excluded from the amounts BPA pays for resources exchanged under this section. Such excluded costs include: the cost of additional resources in an amount sufficient to serve any new large single loads; costs of resources used to serve additional loads outside the region after the effective date of this Act; and costs of any generating facility which is terminated prior to initial commercial operation. This subsection also requires that the exchange be "ramped" in from 50

percent of the residential load in the year beginning July 1, 1980, to 100 percent in the year beginning July 1, 1985.

Section 5(b) mandates continued BPA power sales to existing direct-service industries and prohibits such sales to new DSIs. Existing DSIs will receive the amount of power to which they are entitled under present "Industrial Firm" power sales agreements. These agreements include contingent allowances for defined technological improvements (excluding plant expansion), but no additional BPA sales to existing DSIs are authorized unless the conditions of paragraph (3), including Council approval, are satisfied. The definition of "existing" direct-service industrial customers included in this subsection makes it clear that one DSI with a present contract with BPA but with no existing facilities shall not be considered an "existing" DSI for the purposes of this section.

Sales to existing DSIs are required under this subsection to continue to provide a portion of BPA's power system reserves. The Committee understands and intends that the new DSI contracts under the legislation will provide capacity reserves similar to those provided in the present contracts. Fifty per cent of the then operating DSI load may be restricted for a period of up to two hours to provide a forced outage or peaking power reserve. One hundred per cent of the DSI load may be restricted by BPA for up to five minutes whenever frequency problems arise on the regional grid.

The DSIs will also provide two types of energy reserves. Approximately 25 percent of the DSI load is to be treated as a firm load for purposes of resource operation and will provide an operating reserve that may be restricted by BPA at any time in order to protect the Administrator's firm loads within the region and for any reason, including low or critical streamflow conditions and unanticipated growth of regional firm loads. An additional 25 percent of the DSI load will be treated as a firm load for both

planning and operating purposes and will provide a planning reserve to protect the Administrator's firm loads against the delayed completion or unexpectedly poor performance of regional generating resources or conservation measures implemented or acquired by BPA.

Section 5(e) governs contractual entitlements of BPA customers during any period of insufficiency. Other provisions specify minimum entitlements based on the preference clause or section 5 contract rights; this provision by contrast governs entitlements based on power sold by the customers to BPA under section 6. Each customer's minimum entitlement will be the amount of power so sold to BPA, but not to exceed the customer's actual requirements (excess entitlements go first to customers of the same specified class). Entitlements of a customer under this subsection are in addition to entitlements under section 5 that are not subject to restriction. The Committee intends that BPA will reduce entitlements under this subsection, on a reasonable planning basis, to the extent the actual output of an acquired resource is less than its planned output, so that customers will have an obligation to plan additional resources to make up the difference. A copy of a letter from the Administrator of BPA to the Honorable James Weaver regarding the operation and effect of this subsection can be found later in this report.

Section 5(f) is a technical provision to insure that BPA has the ability to dispose of any temporary or incidentally surplus power under this Act and other laws applicable to BPA power sales.

Section 5(g) governs the offering of initial long-term contracts to BPA customers, including such matters as negotiation, timing of the contract offer, and date of contract effectiveness. Paragraph (6) specifies that the initial contracts with preference customers and Federal agency customers shall provide that during any period of insuffi-

ciency each such customer's contractual entitlement shall not be less than the amount of firm power such customer actually received from BPA in the year prior to the period of insufficiency. This aid to planning certainty during the initial contracts is intended to be compatible with, and not to diminish, the entitlements of such customers and other customers under section 5(e).

SECTION 6 — *Conservation and resource acquisition*

Section 6(a) requires BPA to acquire all conservation resources (including renewable resources installed to reduce loads of residential or small commercial consumers) and to implement all conservation measures BPA determines to be consistent with the plan, or, in the absence of a plan, with the provisions of sections 4(e)(1) and (2). Such measures and resources include, but are not limited to, loans and grants for insulation and weatherization, as well as other listed items.

Section 6(b) requires BPA to acquire sufficient resources to meet its contractual obligations, after taking into account planned savings from conservation and other listed factors. Except as otherwise specifically provided, resource acquisitions shall be consistent with the plan, or, in the absence of a plan, with the provisions of sections 4(e)(1) and (2). Paragraph (3), dealing with resources acquired to replace Federal base system resources, clarifies that BPA will be able to require that such replacement resources be developed and operated consistently with section 4(e)(2) of this legislation. Paragraph (4) requires BPA to continue to acquire and implement conservation measures and conservation resources and certain renewable resources pursuant to section 6(a) regardless of other resource acquisitions. Paragraph (5) requires BPA to exclude the costs, if any, of construction work in progress (that portion of rates related to construction work investment included in a utili-

ty's rate base during the construction period by State regulatory authorities) from any payment BPA may make to investor-owned utilities for a resource acquired under this subsection from them or for power exchanged by them under section 5(c). This provision does not effect BPA's authority to make payments for other costs to investor-owned utilities under resource acquisition contracts such as payments upon completion or termination of construction for financing costs capitalized during construction. It should be noted, however, that section 5(c) expressly excludes from BPA's payments for power acquired under that section the costs of any resource that is terminated prior to commercial operation.

Section 6(c) establishes procedures which govern all BPA actions on major resources. Paragraph (1) contains detailed notice, hearing and decision making requirements which BPA must follow on any major resource proposal and which require BPA to make a determination on whether or not the proposal is consistent or inconsistent with the regional plan, or if no plan is in effect, consistent or inconsistent with the provisions of sections 4(e) (1) and 2). Paragraph (2) provides for the Council to determine whether or not such a proposed action is consistent or inconsistent with the plan, or during the two years preceding plan adoption, consistent or inconsistent with the provisions of section 4(e)(1) and (2). Paragraph (3) provides that if either the Council or BPA determine that a major resource proposal is inconsistent with the plan, or, in the absence of a plan, inconsistent with the provisions of sections 4(e)(1) and (2), then BPA cannot implement such a proposal until the expenditure of funds for that purpose has been specifically authorized by Congress pursuant to bills reported from the committees of Congress having substantive jurisdiction over BPA's statutes. Paragraph (4) sets forth additional procedural steps BPA must follow prior to the implementation of any major resource proposal that BPA is authorized to undertake.

Section 6(d) authorizes BPA to acquire resources (other than major resources) that do not meet the provisions of section 4(e)(1) and (2), but that are experimental or developmental and that have the potential for providing cost-effective service.

Section 6(e) catalogues various of BPA's conservation and renewable resource authorities, and requires that maximum use be made of them. This subsection also requires that BPA work through its customers and other local entities to the extent practicable in making any direct arrangement with consumers.

Section 6(f) permits, under specified conditions, the funding or reimbursement by BPA of certain investigation and preconstruction expenses for resources that BPA may later acquire pursuant to section 6. However, this provision does not enable BPA to provide any such funding or reimbursement for resources that BPA foresees will be terminated or for termination of a resource as the result of a foreseeable and avoidable action of the resource's sponsor. This provision also protects against "bail-outs" by precluding BPA payments for costs incurred by a resource sponsor prior to the effective date of this Act or the effective date of any such agreement.

Section 6(g) provides for the coordination of Federal and State environmental impact statements.

Section 6(h) requires BPA to grant billing credits and provide services to any customer for independent conservation activities or resources undertaken by the customer or by political subdivisions to the extent that such actions reduce BPA's obligation to acquire additional resources. Independent conservation actions for purposes of this subsection are those that provide power savings beyond the savings provided through measures adopted as part of the plan or implemented or acquired by BPA in its implementa-

tion of this Act. Paragraph (2) provides for computation of the amount of energy and capacity on which credits shall be granted, and takes into account changes in customer power and reserve requirements on BPA. Paragraph (3) specifies the amount of the billing credit for conservation activities. Paragraph (4) specifies the amount for resources. Paragraph (5) clarifies that retail rate structures voluntarily implemented by BPA's customers shall qualify as measures for which billing credits shall be granted if such retail rate structures induce customers to conserve or to install consumer-owned renewable resources. Paragraph (6) contains requirements to be met prior to a billing credit being granted, including notice provisions, inclusion in BPA's budget submittal to Congress, and acceptance by the customer of certain contract provisions. These provisions are, first, that certain resources be offered to others for participation to the extent of amounts in excess of the customer's reasonable load growth, and, second, that the operators of generating resources agree as a condition of receiving the credit that the resources will be operated in a manner compatible with the planning and operation of the region's power system. The first of these contract provisions is designed to prevent a "freeze out" of other BPA customers for regional resources being constructed to meet another customer's load growth. Thus, a utility's "reasonable load growth" is intended to be based on such utility's then current 20-year load/resource forecast (before adjustment for conservation activities independently undertaken).

Section 6(i) provides for BPA to include in its resource acquisition contracts, and billing credit contracts for major resources, provisions assuring BPA of effective oversight with respect to resource development, construction, scheduling, operations, costs and environmental protection, including protection of fish and wildlife affected by the development of such resources.

Section 6(j) reaffirms the requirement of the Federal Columbia River Transmission System Act that BPA is a wholly self-financed agency, that its obligations are not obligations of the United States of America nor secured by the full faith and credit of the United States of America, and requires that all offerings and promotional material for the sale of obligations secured by BPA shall include this disclaimer. This subsection is intended to make clear that there are no "Federal guarantees" supporting BPA's obligations, which instead are secured solely by BPA's own revenues from the sale of power and other services.

Section 6(k) requires that benefits under section 6 be distributed equitably through the region, consistent with the provisions of this legislation and BPA's obligations to particular customer classes.

Section 6(l) requires BPA to investigate: (1) possibilities for obtaining economic power supplies from renewable resources outside the region; and (2) opportunities for mutually beneficial interregional power exchanges pursuant to provisions of this section.

Section 6(m) directs BPA to determine that reasonable opportunities to participate in major resources offered to BPA for acquisition have been offered to all Pacific Northwest utilities, or that a reasonable equivalent participation opportunity exists.

Section 6(n) allows the Council to authorize BPA to implement a non-major resource proposal notwithstanding a finding by the Administrator that such a proposal is inconsistent with the plan or, in the absence of a plan, with the provisions of sections 4(e)(1) and (2).

Section 6(o) permits the Council and any customer of BPA to request BPA to take action to carry out its responsibilities under section 6 and to require BPA to act on such requests in a prompt and specified manner. This section

allows the Administrator to decline to take the requested actions if, among other reasons, the Administrator determines that such a request would not be timely. This later provision is not intended to provide the Administrator with an open-ended excuse for not proceeding with the requested action; rather, it is intended to allow the Administrator to decline to take requested actions until he and the Council have had the opportunity to become familiar with the requirements and resource acquisition criteria established by this legislation.

SECTION 7 — *Rates*

Section 7(a) continues the requirement of existing law that BPA set its rates to recover, in total, the full cost (but not more than the full cost) of its financial obligations. This subsection also sets forth the applicable law and procedure upon which the Federal Energy Regulatory Commission shall approve and confirm BPA's periodic rate filings.

Section 7(b) contains the rate directives for power sold to meet the "general requirements" (defined in this subsection) of BPA's public body and cooperative customers and Federal agency customers, as well as power sold by BPA under the section 5(c) exchange. This will be BPA's lowest firm power rate, based on BPA's lowest cost resources. Subsection 7(b)(2) establishes a "rate ceiling" for BPA's preference customers, and specifies the method of calculating this ceiling, in order to insure such customers the cost benefits of their preference rights for sales under this subsection. Amounts not recoverable from preference customers because of this ceiling are to be recovered through supplemental rate charges for all other power sold by BPA under other provisions of section 7, as subsection 7(b)(3) specifies. Subsection 7(b)(4) defines "general requirements" as the power purchased by the relevant customers under section 5(b), exclusive of power used by the customer to serve any new large single loads (defined in section 3(13)). This provision thus affects power rates

only, not the amount of power supplied to the customer under section 5(b).

Section 7(c) contains the rate directives for direct service industrial customers. Prior to July 1, 1985, the rates of these customers shall be set to recover both the costs of serving these loads and the otherwise unrecovered net costs of the section 5(c) exchange. After July 1, 1985, such rates are to be "equitable" in relation to certain specified retail industrial rates in the region; the method of determining the "equitable" rate is set forth in detail in subsection 7(c)(2). Subsection 7(c)(3) specifies that BPA shall adjust such rates to take into account the value of power system reserves made available to BPA through its rights to interrupt or curtail service to these customers.

Section 7(d)(1) permits BPA to offer rate discounts to customers with low system densities such as rural electric cooperatives with high distribution costs resulting from sparsely populated service areas.

Section 7(d)(2) authorizes BPA to establish a special rate for a direct-service industrial customer if (1) the customer's primary resource consists of raw materials indigenous to the region, and (2) all power sold to such a customer may be interrupted, curtailed or withdrawn to meet firm loads in the region. The Committee is aware of only one direct-service industrial customer, the Hanna Nickel Mining and Smelting Company, Riddle, Oregon, which would meet the criteria of this paragraph.

Section 7(e) clarifies that BPA may continue, as it does under existing law, to charge uniform rates for the sale of electric peaking capacity. This subsection also clarifies that the rate directives contained in this bill only govern the amount of money BPA is to collect from each class of customer and not the form of the rate used to collect that sum of money. For example, time-of-day rates, seasonal

rates, rate structures designed to give BPA customers particular price signals, and other rate forms would be permissible.

Section 7(f) is the rate directives for the so-called "new resources rate" that BPA will charge customers for sales other than those to which a different rate directive applies. This rate directive applies only to firm power sales for use within the Pacific Northwest. It will be used, for example, for power sold to investor-owned utilities to meet their net requirements, and for power sold to preference customers for service to new large single loads.

Section 7(g) provides for the allocation of costs and benefits that are not otherwise allocated by other provisions of this bill or other applicable laws currently in effect.

Section 7(h) authorizes BPA to adjust power rates to include surcharges arising under section 4(f), and to allocate the revenues from any such surcharges in a manner that will achieve the conservation purposes of section 4(f). This provision specifically does not authorize BPA to collect in total more revenue than needed to meet its total costs, thus reaffirming the requirements of section 7(a).

Section 7(i) sets forth detailed procedures BPA must follow in establishing rates. In general, the procedures of this subsection parallel those followed by BPA today. However, this subsection will change these existing procedures in one respect since it contains a requirement that cross-examination must be allowed at BPA's rate hearings. This requirement is intended to eliminate the hearing officer's discretion to prohibit cross-examination altogether, not the hearing officer's ability to prevent the use of unwarranted cross-examination as a dilatory tactic. Section 7(i) also authorizes FERC to approve all of BPA's final rates on an interim basis but allows the Secretary of Energy to exercise such interim approval of such rates for appli-

cation until such time as FERC establishes procedures of its own for interim approval of BPA's final rates.

Section 7(j) requires BPA, in its power billings to its customers, to break down the costs of different resource categories and to indicate the cost of new resources in relation to the average cost of BPA resources. This will allow BPA's customers to identify, for themselves and for their ratepayers, the costs of load growth to the region.

Section 7(k) governs the method of determining BPA's rates for the sale of nonfirm electric power to other regions of the United States. Such rates shall continue to be governed by existing law, and shall become effective after review by FERC under the procedures of the Federal Power Act.

Section 7(l) authorizes BPA to establish rates for the sale of power outside the United States (i.e., to Canada), and to negotiate such rates if appropriate to insure equitable treatment in relation to the rates charged for power purchased by BPA from entities outside the United States. The purpose of this provision is to protect regional consumers from the economic penalties of selling low and buying high in dealings with Canada.

SECTION 8 — *Amendments to existing law*

Section 8(a) amends the Federal Columbia River Transmission System Act to permit BPA to use the BPA Fund to make short term power purchases to enable BPA to meet its obligations under the fish and wildlife provisions of this bill (e.g., to buy power to replace power generating capability that may be lost through a spill for fish passage purposes at a Federal dam). This is designed to reduce conflicts between fisheries agencies and BPA customers by ensuring that BPA can meet its obligations to each.

Sections 8(b) and (c) are technical amendments to the Federal Columbia River Transmission System Act needed

to permit BPA to use its self-financing ability to carry out the provisions of this bill.

Section 8(d) amends the Federal Columbia River Transmission System Act with respect to BPA's borrowing authority. Under the authority of that Act, BPA is authorized to borrow by selling bonds to the United States Treasury to finance the construction of the Pacific Northwest's high-voltage transmission system.

Paragraph (1) of this subsection amends that Act to permit BPA to utilize its existing borrowing authority in order to implement this bill, but not for the purpose of acquiring under section 6 of this bill electric power from a generating facility with a planned capability of more than 50 average megawatts, or from any smaller generating facility other than one utilizing renewable resources.

Paragraph (2) of this subsection amends that Act to specify that the interest rate Treasury charges BPA shall be the rate at which Treasury borrows plus a sufficient markup to raise the total rate to the level of similar bonds sold by other government agencies. This paragraph also requires BPA to pay a one per cent interest rate penalty on any amount that is not repaid to Treasury in a timely fashion in any given year under applicable repayment criteria. The Committee included this interest penalty provision in S. 885 so as to provide BPA with an incentive to keep its repayment obligations current. However, the Committee is aware that BPA's revenues are dependent upon streamflows in the region and that these revenues fluctuate significantly in response to fluctuations in annual streamflows. Consequently, the Committee believes it would be appropriate for BPA to include as a cost in its rates an allowance to cover the possibility of less than average water conditions so as to enable it to make the timely repayments necessary to avoid the interest rate penalty.

Paragraph (3) of this subsection amends that Act by increasing BPA's existing \$1,250,000,000 borrowing limit

by an additional \$1,250,000,000 after October 1, 1981, for the purpose of creating a special revolving account in the BPA fund for conservation and renewable resource loans and grants.

Section 8(e) is a technical provision to conform the definition of the Pacific Northwest region in the Act of August 31, 1964 (Public Law 88-552) to that used in this bill.

Section 8(f) amends the Federal Columbia River Transmission System Act to add provisions for annual impact aid payments by BPA to State and local governments. Such payments are mandated if BPA completes, after the effective date of this Act, the initial construction of BPA major transmission facilities that are exempt from State and local real property taxes although located within the jurisdiction of a State or local government to whom such payments shall be made. Such payments are discretionary in other specified circumstances. Payments are to be made under a region-wide formula that BPA establishes by rule; the formula is to be based on certain specified factors. BPA's payment to any State and local government shall not exceed the amount that BPA determines would be paid to such government if the transmission facilities were not exempt from State and local real property taxes. As with all other transmission system costs, such payments should be charged to the transmission system and equitably allocated by BPA between Federal and non-Federal uses of the transmission system (see section 7(a)(2)(C)).

The purpose of this section is to compensate State and local governments for impacts incurred as a result of transmission facilities being constructed by BPA.

SECTION 9 — *Administrative provisions*

Section 9(a) is a technical provision integrating BPA's general contracting authority under section 2(f) of the Bonneville Project Act with its contracting authority under

this bill, and therefore avoiding potential conflicts between BPA's statutes with respect to contract matters.

Section 9(b) governs the relationship of BPA and the Department of Energy, and mandates that BPA, DOE and the Council are to assure the timely implementation of this bill in a sound and businesslike manner.

Section 9(c) insures that BPA sells outside the region (both directly and indirectly) only that power which is excess to the needs of the region.

Section 9(d) serves two purposes. First, it clarifies that utilities (unlike BPA) are free to dispose of their own non-Federal power (both firm and non-firm) so long as they do not thereby increase BPA's firm power obligations. Second, the subsection requires BPA to provide available services and facilities to such utilities for such sales, and prohibits BPA from discriminating in the provision of such services against any utility or group thereof on the basis of their independent development of resources. Both parts of this subsection therefore preserve the individual and collective independence of utilities and groups of utilities, as well as reaffirming the requirement contained in section 6 of the Federal Columbia River Transmission System Act that BPA make available on a fair and non-discriminatory basis Federal transmission system capacity in excess of the capacity required for power generated or acquired by the United States.

Section 9(e) governs judicial review of final actions under this bill, and includes (i) a list of final actions, (ii) provisions with respect to scope of review and the record on review, (iii) specification of when particular actions shall be deemed to be taken, and (iv) specification of the appropriate court and the time within which suits to challenge actions or decisions under this Act may be brought.

Section 9(f) contains provisions to insure that the ability of state and local governments to engage in tax-exempt

municipal financing of power facilities is preserved but not extended, and that the regulations of the Internal Revenue Service applicable to industrial development bonds in general shall continue to apply to resources financed through tax-exempt bonds in the Pacific Northwest. Under section 5(b), BPA will be obligated to meet all the load growth requirements of requesting preference utilities from the effective date of this Act; this provision is designed to insure that utilities with tax-exempt status will be able to provide to BPA the resources necessary to meet this load growth without losing their tax-exempt status.

Section 9(g) provides that FERC shall convene a joint State board under section 209 of the Federal Power Act to assist it when it reviews rates paid by BPA to investor-owned utilities for power acquired from such utilities under sections 5(c) and 6 of this bill. This provision permits State regulatory agency participation in the review of rates that would otherwise not be subject to State jurisdiction because the relevant sales would be sale of power in interstate commerce.

Section 9(h) establishes terms and conditions for, and regulatory control over, the creation and operation of electric generating entities that may be formed in order to sell resources to BPA under this bill. This subsection provides that such generating entities do not become "electric utility companies" for purposes of the Public Utility Holding Company Act if a number of conditions are satisfied. These conditions include the review by the Securities and Exchange Commission for consistency with the policies specified in section 1(b) of that Act. These conditions are intended to preclude possible abuses which could result from unconditional exemption. The purpose of this subsection is to permit BPA to acquire resources from investor-owned utilities at the lowest obtainable power cost in order to avoid adverse impacts on the rates of BPA's other customers.

Section 9(i) sets forth additional services BPA is to provide its customers, at their request and expense, with respect to power sales and purchases of their own. This subsection essentially ratifies BPA's existing policies on services, except that paragraph (3) creates a limited and contingent priority on BPA's available services for the marketing of power from projects currently under construction in the region, should BPA decline to acquire these resources.

Section 9(j) requires the Council to prepare a report on retail rate structures that encourage cost-effective conservation and consumer-owned renewable resources and authorizes the Administrator to assist customers in analyzing and developing such rate structures.

Section 9(h) establishes within BPA an Assistant Administrator position for conservation and renewable resources.

SECTION 10 — *Savings Provisions*

Section 10(a) is a savings provision to preserve the rights of States, local governments and utilities to (1) determine retail electric rates, (2) develop and implement conservation and resources, and (3) continue to make all energy facility siting decisions.

Section 10(b) preserves the rights and obligations of all parties under existing contracts so that this bill will not be construed as abrogating any contract. It is anticipated, however, that certain contracts such as power sale contracts will be surrendered voluntarily by BPA customers who wish to obtain new contracts under this bill.

Section 10(c) expressly preserves the provisions of Federal laws by which public bodies and cooperatives are entitled to preference and priority in the sale of Federally generated electric power. (The preference provisions of the Bonneville Project Act are expressly preserved in section 5(a) of this bill.)

Section 10(d) recognizes and clarifies that certain specified contracts executed pursuant to this bill shall not be affected by any subsequent judicial determination that any provision of this bill may be unconstitutional. The purpose of this provision is to permit the bill to be implemented, and contracts under the bill to be relied upon, on the schedule set forth in other provisions of the bill.

Section 10(e) preserves all treaty and other rights of Indian Tribes.

Section 10(f) relates to appropriations of water and to water rights generally. Paragraph (1) clarifies that this bill does not authorize any appropriation of water by any entity. Paragraph (2) states that in the implementation of this Act, the Federal government and its agents, permittees or licensees shall not appropriate, use, divert, dedicate, or claim water within any State except pursuant to substantive and procedural provisions of State law, regulation or rule of law. Paragraphs (3) and (4) preserve, respectively, State laws and interstate compacts governing the appropriation, use, diversion, dedication of, and claim to, water, and the rights of Indian Tribes. The intent of the latter provision is to preserve reserved rights that such tribes may possess.

Section 10(g) reaffirms the provisions of section 6(j) by making clear that BPA alone, not the United States of America or any other Federal entity, is obligated to perform any new contracts executed by BPA pursuant to this bill. Similarly, this subsection makes clear that the United States of America is not obligated to perform any contracts that may be executed by the Council.

Section 10(h) affirms the reservation under law of electric power for use in the State of Montana by reason of the construction of Hungry Horse and Libby Dams and Reservoirs within that State, as well as the reservation of 50

percent of the power produced at Libby Reregulating Dam, if built.

This section establishes the method of determining the effective date of this bill after it has become an Act.

Appendix F

SENATE

96th Congress—1st Session

Report—No. 96-272

PACIFIC NORTHWEST ELECTRIC POWER PLANNING AND CONSERVATION ACT

July 30 (legislative day, June 21), 1979.

—Ordered to be printed

Mr. Jackson, from the Committee on Energy and
Natural Resources, submitted the following

REPORT

[To accompany S. 885]

The Committee on Energy and Natural Resources, to which was referred the bill (S. 885) to assist the electrical consumers of the Pacific Northwest through use of the Federal Columbia River Power System to achieve cost-effective energy conservation, to encourage the development of renewable energy resources, to establish a representative regional power planning process, to assure the region of an efficient and adequate power supply, and for other purposes, having considered the same, reports favorably thereon with an amendment and recommends that the bill, as amended, do pass.

The amendment is as follows:

Strike out all after the enacting clause and insert the following:

That this Act may be cited as the "Pacific Northwest Electric Power Planning and Conservation Act".

FINDINGS

SECTION 2. The Congress finds that—

(a) The Federal Columbia River Power System offers a unique opportunity to encourage policies of conservation and efficiency in the use of electric power within the Pacific Northwest.

(b) The participation and consultation of the Pacific Northwest States, local communities, ratepayers, the Administrator's customers, users of the Columbia River system (including fisheries agencies), and the public at large within the region are essential in development of regional plans and programs related to energy conservation, renewable resources, other generating resources and orderly planning of the Federal Columbia River Power System.

(c) The ratepayers of the Pacific Northwest should continue to pay all costs necessary to produce, transmit, and conserve electric power to meet the region's electric power requirements, including the amortization of the Federal investment in the Federal Columbia River Power System.

DEFINITIONS

SECTION 3. As used in this Act—

(a) "Administrator" means the Administrator, Bonneville Power Administration.

(b) "Conservation" means any reduction in electric power consumption as a result of increases in the efficiency of energy use, production or distribution.

(c) A conservation measure or any resource is "cost-effective" if it is forecast to be available within the time it is needed and if it is forecast to meet or reduce the electric power demand of the consumer at an estimated incremental system cost no greater than that of the least-cost similarly available alternative conservation measure or resource: *Provided*, That such cost estimates shall include estimates of all direct systems costs of the conserva-

tion measure or resource over its effective life, including, if applicable, the cost of distribution and transmission to the consumer, and, among other factors, waste disposal costs, end-of-cycle costs, and fuel costs, and such quantifiable environmental and social costs and benefits as the Administrator determines, on the basis of a methodology developed by the Council as part of the plan, are directly attributable to the conservation measure or resource: *Provided further*, That any conservation measure may have an estimated incremental system cost of up to 110 per centum of the least cost alternative nonconservation resource.

(d) "Council" means the Pacific Northwest Electric Power Planning Council established pursuant to this Act.

(e) "Customer" means an entity that contracts for the purchase of power from the Administrator, either for resale or for direct consumption.

(f) "Direct service industrial customer" means an industrial customer that contracts for the purchase of power from the Administrator for direct consumption.

(g) "Electric power" means electric peaking capacity or electric energy or both.

(h) "Federal base system resources" means the Federal Columbia River Power System hydroelectric projects, resources acquired by the Administrator under long-term contracts in force on the effective date of this Act, and resources acquired by the Administrator to replace reductions in capability of the foregoing resources.

(i) "Major resource" means a resource having a capability greater than fifty average megawatts, and, if acquired by the Administrator, is acquired for a period longer than five years.

(j) "New large industrial load" means an industrial load associated with a new industrial plant or an expansion of an existing plant or an existing industrial plant load which

is not contracted for or committed to by a public body, cooperative, or Federal agency customer prior to October 1, 1978, any of which will result in an increase in power requirements of ten average megawatts or more in any three-year period; *Provided*, That the Council may recommend to the Congress for approval a different limitation in the maximum size of such new large industrial load.

(k) "Pacific Northwest", "region", or "regional" means:

(1) the region consisting of the States of Oregon, Washington, and Idaho, the State of Montana west of the Continental Divide, and such portions of the States of Nevada, Utah, and Wyoming as are within the Columbia River drainage basin; and

(2) any contiguous areas, not in excess of seventy-five airline miles from said region, which are a part of the service area of a distribution cooperative served by the Administrator on the effective date of this Act which has a distribution system from which it serves both within and without said region.

(l) "Plan" means the regional electric power plan prepared and adopted pursuant to this Act.

(m) "Renewable resource" means a resource which utilizes a renewable source of energy, including, but not limited to, solar, wind, hydro, geothermal, and biomass, and which is used for electric power generation or which will reduce the electric power requirements of a consumer by direct application.

(n) "Reserves" means the electric power needed to avert particular planning or operating shortages for the benefit of firm power customers of the Administrator and available to the Administrator either from resources or through rights to interrupt, curtail, or otherwise withdraw, as provided by specific contract provisions, portions of the electric power supplied to customers.

(o) "Residential use" or "residential load" means all usual residential, apartment, seasonal dwelling and farm electrical loads or uses, but only the first four hundred horsepower of farm irrigation and pumping for any farm.

(p) "Resource" means (1) electric power, including the actual or planned electric power capability of generating facilities or (2) actual or planned load reduction resulting from direct application of a renewable energy resource, or from a conservation measure.

REGIONAL PLANNING AND PARTICIPATION

SECTION 4. (a) There is established the Pacific Northwest Electric Power Planning Council composed of five members. The Governors of the States of Idaho, Oregon, Montana, and Washington may under applicable State laws each appoint one member to the Council from their respective States. The Administrator shall serve as the fifth member of the Council.

(b) The Council shall select a chairman from among its members. Three members of the Council shall constitute a quorum for conducting business. Decisions of the Council shall be by majority vote: *Provided*, That any action to approve or amend the plan described in subsections (d) and (e) of this section, or any element thereof, must receive the votes of at least three members of the Council, including the vote of the Administrator, to be adopted. The Council shall adopt rules of procedure, including rules applicable to its public hearings.

(c) Each State's member of the Council may request Council approval of funding in support of his State's participation in the Council and activities of his State related thereto. The Administrator shall include in his annual budget submitted pursuant to Public Law 93-454 (as amended), such requests approved by the Council, not to exceed a total amount equal to 0.02 mills per kilowatt-hour

of the Administrator's estimated sales in the year the budget is to be effective. In order to assist initial State participation in the Council, the Administrator shall prepare and propose an amended annual budget as soon as practicable after the enactment of this Act to expedite payments to the States.

(d) The Council shall direct the preparation of a regional electric power plan, and shall adopt such plan within two years after the effective date of this Act. The adopted plan or any portion thereof may be amended from time to time, and shall be reviewed not less frequently than once every five years. Within one year from the effective date of this Act, and thereafter prior to each review, the Council shall identify major subject areas to be included in the plan. Public hearings shall be held in each member's State on (1) major subject areas to be addressed in the plan, and (2) the plan or amendments to the plan, proposed by the Council for adoption: *Provided*, That a public hearing shall also be held in any other State of the region on the plan, or amendments, proposed for adoption if the Council determines that the plan or amendments would likely have a substantial impact on that State in terms of major resources which may be developed in that State and which the Administrator may seek to acquire. The Council shall take action under this subsection pursuant to section 553 of title 5, United States Code.

The Administrator's implementation of the authorities under this Act shall be consistent, to the extent he determined feasible, with the plan: *Provided*, That the Administrator shall notify the Council of any actions not consistent with the plan together with his reasons for taking such actions: *Provided further*, That the Administrator's implementation of the authorities in sections 6 (a) through (d), (f) and (h) shall be consistent with the plan as he determines or, notwithstanding his determination, as the Council, within 60 days of his determination by majority

vote of the full Council, may determine: *Provided, however,* That if no plan is in effect or a proposed implementation of a conservation measure or an acquisition of a resource is not consistent with the plan, the Administrator may proceed to implement the conservation measure or acquire the resource pursuant to the procedures in section 6 (a) through (c).

(e) The plan shall give the following priority to resources: first, to conservation; second, to renewable resources; third, to generating resources utilizing waste heat and generating resources of high fuel conversion efficiency; and fourth, to all other resources: *Provided,* That all such resources shall be cost effective and feasible:

(1) The plan shall set forth a general scheme for implementing conservation and developing resources to reduce or meet the Administrators' obligations with due consideration for environmental quality, compatibility with the existing regional power system, preservation and enhancement of fisheries, and other criteria which may be set forth in the plan.

(2) The plan shall also include, but not be limited to, model conservation standards, areas for research and development, a methodology for determining the average system cost of resources exchanged under section 5(b)(2), a methodology for determining quantifiable environmental and social costs and benefits under section 3(c), and a twenty-year demand forecast which includes regional reliability and reserve requirements.

(f) Model conservation standards for inclusion in the plan shall (1) include, but not be limited to, standards applicable to new and existing structures, utility, customer and governmental conservation programs, and other consumer actions for achieving conservation, and (2) be designed to produce all power savings that are reasonable,

feasible and cost-effective to consumers. If the Council so recommends by majority vote of the full Council, the Administrator may impose additional charges on customers for those portions of their load within the region that are within States or political subdivisions which have not, or on his customers which have not, implemented conservation measures applicable to themselves that achieve energy savings which the Administrator determines are comparable to those which would be obtained under such model conservation standards. Such charges shall be set to recover additional costs the Administrator determines he will incur because such energy savings have not been achieved, but in no case may such charges be less than 10 per centum or more than 50 per centum of the Administrator's applicable rates for such load or portion thereof.

(g) To insure widespread public involvement in the formulation of regional power policies, the Administrator (1) shall maintain comprehensive programs, including programs in cooperation with the Council, to inform the Pacific Northwest public of major regional power issues, to obtain public views concerning those issues, and to secure advice and consultation from the Administrator's customers and other parties; and (2) may form advisory committees as appropriate.

(h) The Council shall request annually from the region's State and Federal fisheries agencies and the appropriate Indian tribes their recommendations of measures which would contribute to the preservation and enhancement of the fish resources of the Columbia River and its tributaries for inclusion in the plan and their recommendations for the funding of research and development efforts which have the potential of providing improved passage for anadromous fish migrants at and between the region's hydroelectric dams. The Council shall consider such recommendations in the preparation of the plan or amendments to the plan. Upon the adoption of the plan or amend-

ments to the plan by the Council, the Administrator shall (1) include in his annual budget funds for fisheries research and development to be paid from the Bonneville Power Administration fund, or from appropriations, and (2) acquire and dispose of power and utilize the flexibility of the resources available to him in a manner which will assist in the preservation and enhancement of the anadromous fisheries resource while meeting his other obligations.

SALE OF POWER

SECTION 5. Subject at all times to the preference and priority provisions of the Bonneville Project Act of 1937, Public Law 75-329 (as amended), and, in particular, sections 4 and 5 thereof, and at rates established pursuant to section 7 of this Act—

(a) Whenever requested the Administrator shall offer to sell to each requesting public body and cooperative entitled to preference and priority under Public Law 75-329 (as amended), and to each requesting investor-owned utility, electric power to meet such customer's firm power load in the region which is in excess of the capability of such customer's firm resources which such customer had used in the year prior to enactment of this Act to serve its firm load and such other resources as such customer shall determine, pursuant to contracts under this Act, will be used to serve its firm load: *Provided*, That such resources shall continue to be so used except with the consent of the Administrator or because of obsolescence, retirement, loss of resource or loss of contract rights.

The Administrator shall include in contracts executed in accordance with this subsection provisions that enable him to restrict his obligations to meet such loads in the event he determines, after a reasonable period of experience under this Act, that he cannot be assured of acquiring sufficient resources pursuant to section 6 to meet such loads, but (1) no such restrictions shall be applicable to

the Administrator's public body and cooperative customers entitled to preference and priority under Public Law 75-329 (as amended), or to his Federal agency customers, until the Federal base system resources are fully allocated to such customers; and (2) sales to customers pursuant to this subsection shall not be restricted below the amounts of electric power, as specified in such contracts, acquired by the Administrator from or on behalf of such customer pursuant to subsection 5(b)(2) and section 6. The Administrator shall, consistent with the provisions of this Act, insure that any such restrictions pursuant to this subsection are distributed equitably throughout the region.

(b) Additionally, (1) the Administrator is authorized to sell electric power to Federal agencies in the region, and (2) whenever a Pacific Northwest utility offers to sell electric power to the Administrator at the average system cost of resources then available to that utility, the Administrator shall purchase such power and shall offer, in exchange, to sell an equivalent amount of electric power to such utility for resale to that utility's residential users within the region: *Provided*, That (A) such sale shall be limited to an amount not to exceed 50 per centum of each such utility's regional residential load in the year beginning July 1, 1980, and increasing in equal annual increments to 100 per centum of such load in the year beginning July 1, 1985; (B) the cost benefits, as specified in contracts, of any such exchange sale which are attributable to any utility's residential load within a State shall be passed through directly to the utility's residential loads within such State: *Provided*, That a State which lies partially within and partially without the region may require that such benefits be distributed among all of the utility's residential loads in that State; (C) a utility may terminate, upon reasonable terms and conditions, its exchange purchase and sale in the event the supplemental rate charge provided for in section 7(b) is applied and the cost of

electric power sold to the utility under this subsection exceeds, after application of such rate charge, the average system cost of power sold by the utility to the Administrator under this subsection; and (D) the Administrator may acquire the electric power necessary to carry out the exchange sale from other resources, rather than purchase the electric power offered him by the utility pursuant to this subsection, if the cost of doing so is less than the cost of purchasing the electric power offered by the utility.

The "average system cost" for electric power sold to the Administrator under this subsection shall be determined by the Administrator, subject to review and approval by the Federal Energy Regulatory Commission as provided in section 9(g), on the basis of a methodology developed for this purpose. Such methodology shall be developed by the Council as part of the regional electric power plan identified in section 4, or, until such a plan has been adopted, shall be developed by the Administrator in consultation with his customers in the region and appropriate State regulatory bodies. Average system cost shall not in any event include: (i) the cost of additional resources in an amount sufficient to serve any new large industrial load of the utility that was not contracted for or committed to prior to October 1, 1978; (ii) the cost of additional resources in an amount sufficient to meet any additional load outside the region occurring after the effective date of this Act; and (iii) any costs of a generating facility which is terminated prior to commercial operation.

(c)(1) The Administrator is authorized to sell electric power to direct service industrial customers which have contracts for the purchase of electric power from him on the effective date of this Act, so long as such sales provide a portion of the reserves for firm power loads within the region. To effectuate the purposes of this subsection the Administrator shall offer to such customers new long term contracts in accordance with section 9(c) that provide such

customers an amount of power equivalent to that to which such customers are entitled under present industrial firm contracts. The offer and execution of these initial new contracts shall be deemed to be supported by a sufficiency of electric power available to the Administrator.

(2) The Administrator shall not offer to sell amounts of electric power, including reserves, to new direct service industrial customers or to existing direct service industrial customers in addition to the amounts provided under subsection (c)(1) unless the Council has approved such sale by majority vote of the full Council and the Administrator determines that such proposed sale is consistent with the plan and that (A) additional power system reserves are required for the region's firm loads, (B) additional direct service industrial loads would provide a feasible and cost-effective method of supplying such reserves, (C) loads of similar character cannot provide equivalent operating or planning benefits of the region if served by a utility, and (D) the Administrator has or can acquire sufficient electric power to serve such loads. After such determination and approval by the Council, the Administrator is authorized to offer to new or existing direct service industrial customers an additional amount of power providing reserves in the amount determined to be necessary.

(d) The Administrator is further authorized to sell or otherwise dispose of electric power, including acquired power, that is surplus to his obligations incurred pursuant to subsections (a), (b), and (c) of this section in accordance with this and other statutes applicable to the Administrator.

CONSERVATION AND RESOURCE ACQUISITION

SECTION 6. (a) The Administrator shall, to the maximum extent practicable, implement all conservation measures he determines to be consistent with the plan. If no plan is in effect the Administrator shall implement conservation measures he determines are feasible and consistent with the

criteria of section 4(e): *Provided*, That no mandatory conservation requirements shall be set by the Administrator pursuant to this authority in the absence of a plan. Such measures may include, but are not limited to, financial assistance for insulation or weatherization, increased system efficiency, and waste energy recovery by direct application. The Administrator may, in accordance with the provisions of this section, conduct demonstration projects to determine the feasibility of conservation measures and direct application renewable energy resources: *Provided further*, That no obligation may be incurred for any such demonstration project until such proposal is explicitly noted in the Administrator's budget submittal to the Congress pursuant to Public Law 93-454 (as amended). In addition, he shall assist conservation by and among regional consumers by (1) providing technical or financial assistance, (2) cooperating with his customers and governmental authorities to encourage maximum cost-effective voluntary conservation, and (3) aiding his customers and governmental authorities in implementing conservation standards adopted pursuant to section 4(f).

(b) The Administrator shall meet his contractual obligations that remain after taking into account planned savings from conservation measures provided in this section by acquiring additional resources (in addition to electric power acquired on a short term basis pursuant to section 11(b) (6)(i) of Public Law 93-454 (as amended)) he determines to be consistent with the plan or, if no such plan is in effect, which he determines, after compliance with section 6(c), are consistent with section 4(e). The Administrator shall acquire resources to replace Federal base system resources in accordance with the provisions of section 6 of this Act except in the case of federally constructed resources otherwise authorized by the Congress. Notwithstanding any acquisition of resources, the Administrator shall not reduce his efforts to achieve conservation savings pursuant to section 6(a).

(c)(1) In proposing to acquire any major resource, the Administrator shall give notice of the proposed action to the Council, his customers and the State in which the resource would be acquired, solicit views and relevant information, conduct a public hearing, and not less than ninety days after such notice may make a decision supported by a written statement, which statement shall include specific findings that the proposed acquisition is consistent with the plan unless such acquisition is proposed pursuant to parts (3) or (4) of this subsection.

(2) The Administrator shall submit to appropriate committees of the Congress the administrative record which shall consist of his written statement in support of any major resource acquisition decision made pursuant to this subsection together with (A) all statements, data, and other information on which the Administrator relies, including information received by him from the Council and his customers; (B) the transcript or other record (including all exhibits) of the hearing; (C) a record of all other relevant views and reactions received by him; and (D) a statement of the procedures followed or to be followed for compliance with the National Environmental Policy Act, Public Law 91-190 (as amended). The Administrator thereafter shall publish notice of his decision in the Federal Register. The Administrator may not implement any such decision or make any financial commitment for a major resource acquisition under this subsection prior to ninety days after the date of publication in the Federal Register and until it has been noted in the Administrator's budget submittal made pursuant to Public Law 93-454 (as amended); *Provided*, That in the absence of a plan or if the proposal is inconsistent with the plan, no financial commitment for a major resource acquisition shall be made until the acquisition has been specifically approved by Act of Congress.

(3) If within two years after the effective date of this Act, the Administrator proposes to acquire a major re-

source, but no plan is yet in effect, the Administrator may acquire such resource by following the procedure set forth in subsections (c) (1) and (2), except that his written statement shall include specific findings that acquisition of the resource is consistent with the criteria of subsection 4(e).

(4) If, subsequent to the adoption of a plan the Administrator wishes to be able to acquire a resource or undertake a conservation measure which he determines to be inconsistent with such plan, or in the absence of an adopted plan two years after the effective date of this Act, the Administrator may acquire a resource or undertake a conservation measure pursuant to the following procedure: (A) the Administrator shall propose to the Council a plan, or an amendment to the existing plan, with which the proposed action would be consistent, and submit a written statement to the Council that the plan or proposed amendment is needed to permit the proposed action, that the resource or conservation measure is needed to meet the Administrator's obligations, and that the resource or conservation measure is consistent with the criteria set forth in subsection 4(e); (B) the Council shall proceed with hearings in accordance with provisions of section 4(d)(2); (C) if within ninety days after the submission of the Administrator's proposal the Council has not adopted a plan or plan amendment with which, in the Administrator's determination, the proposed action is consistent, the Administrator may proceed with the action after following the procedure established under parts (1) and (2) of this subsection. For the acquisition of a resource or implementation of a conservation measure, either of which the Administrator determines to be inconsistent with the plan, public hearings shall be held pursuant to section 556 of title 5, United States Code, and the Administrator shall make a written statement in support of his decision pursuant to section 557 of title 5, United States Code.

(5) The Administrator shall determine in each case of a major resource acquisition that a reasonable share of the particular resource, or a reasonable equivalent, has been offered to each Pacific Northwest utility for ownership, participation, or other sponsorship but not in excess of the amounts needed to meet its regional load.

(d) The Administrator is authorized to acquire a resource, other than a major resource, which does not meet criteria of section 4 but which he determines is an experimental, developmental, demonstration or pilot project of a type with a potential for providing feasible, cost-effective, and reliable service to the region. The Administrator is authorized to construct such a project if it is a renewable resource and he determines that no utility or political subdivision in the Pacific Northwest is willing to construct such project at reasonable cost. The Administrator shall make no obligation for the acquisition of construction of such a resource until it has been noted in his budget submittal to the Congress pursuant to Public Law 93-454 (as amended).

(e) To the extent conservation measures or acquisition of resources require direct arrangements with consumers of electric power, the Administrator shall make maximum practicable use of his customers and other local entities capable of administering and carrying out such arrangements.

(f) For resources which the Administrator determines will be not inconsistent with the plan or for which he proposes to follow the procedures of section 6(c) (3) and (4), the Administrator is authorized to enter into agreements with sponsors of (1) a renewable resource, other than a major resource, to fund or secure debt incurred in the investigation and initial development of such resource which may be proposed for acquisition by the Administrator, or (2) any other resource, which on preliminary data he finds

would satisfy criteria of this Act, to provide for the reimbursement of the sponsor's investigation and preconstruction expenses (which expenses shall not include procurement of capital equipment or construction material for such resource) if such resource is subsequently denied State siting approval or other necessary Federal or State permits, or if such investigation subsequently demonstrates, as determined by the Administrator, that such resource does not meet the criteria of this Act, or is not acceptable because of environmental impacts, or after such investigation the Administrator determines not to purchase the resource and the resource is not constructed: *Provided*, That any such agreements shall provide the Administrator an option to acquire any such resource: *Provided further*, That the Administrator shall terminate his financial commitment as to any further expense incurred by the sponsors (except necessary expenses involved in the liquidation of the resource) after a final denial of application for State siting approval. No further commitment may be made by the Administrator until the Administrator has completed such procedures as may be required by the National Environmental Policy Act, Public Law 91-190 (as amended).

(g) At the request of the appropriate State, any environmental impact statement which may be required with respect to a resource, to the extent determined possible by the Administrator, shall be prepared jointly and in coordination with any required environmental impact statement of the State or any other statement which serves the purpose of an environmental impact statement which is required by State law.

(h) The Administrator is authorized to grant billing credits and provide services to any of his customers for independent conservation activities undertaken by such customers or political subdivisions served by a customer and for resources constructed, completed or acquired by

a customer or political subdivision after the effective date of this Act which reduce the obligation of the Administrator to acquire resources under this Act. Any such credits which are granted for a major resource shall be granted only if such grant is determined by the Administrator to be not inconsistent with the plan or if such credits are authorized pursuant to the procedures of section 6(c)(4). The Administrator shall be required to grant credits (1) to the extent such customer or political subdivision undertakes independent conservation measures which the Administrator finds will achieve energy savings beyond the measures included in the plan, and (2) for a renewable resource or a multipurpose project uniquely suitable for such customer's or political subdivision's development. The Council may develop and propose guidelines to the Administrator to assist in the determination of the amount of such credits. The Administrator shall determine the amount of credits taking into account guidelines recommended by the Council and the risks and benefits assumed by the entity to be credited and the risks and benefits provided to the Administrator's customers: *Provided*, That any credits under this subsection shall be granted only to the extent they are cost effective.

(i) Contracts for acquisition of resources entered into pursuant to this section shall contain such terms and conditions as the Administrator finds necessary or proper to insure timely construction, scheduling, completion, and operation of new resources, to insure that the costs of any acquisition are as low as reasonably possible, consistent with sound engineering, operating, and safety practices, and to provide the means for the Administrator to exercise effective oversight, audit, and review of all aspects of such construction and operation.

(j) At the request and expense of any customer or group of customers of the Administrator within the Pacific Northwest, the Administrator shall, to the extent practicable—

(1) acquire any electric power required by (A) any customer or group of customers to enable them to replace resources determined to serve firm load under subsection 5(a), or (B) direct service industrial customers, to replace electric power that is or may be curtailed or interrupted by the Administrator (other than power he is himself obligated to replace), with the cost of such replacement power to be distributed among the direct service industrial customers requesting it: *Provided*, That the Administrator may prescribe policies and conditions for the independent acquisition of replacement power by any direct service industrial customer or group of such customers for the purpose of assuring each direct service industrial customer an opportunity to participate in such acquisitions; and

(2) dispose of, or assist in the disposal of, any electric power that a customer or group of customers proposes to sell within or without the region at rates and upon terms specified by such customer or group of customers, if such disposition is not in conflict with the Administrator's other marketing obligations and the policies of this Act and other applicable statutes, and with respect to direct service industrial customers, if such sale is under terms and conditions acceptable the Administrator.

The Administrator shall furnish services including transmission, storage, and loan factoring unless he determines such services cannot be furnished without substantial interference with his power marketing program, applicable operating limitations or existing contractual obligations. The Administrator shall, to the extent practicable, give priority in making such services available for the marketing, within and without the Pacific Northwest, of capability from projects under construction on the effective date of this Act, if such capability has been offered for sale at cost,

including a reasonable rate of return to the Administrator pursuant to this Act and such offer is not accepted within one year.

(k) All obligations incurred by the Administrator pursuant to this Act shall be secured solely by the Administrator's revenues received from the sale of electric power and other services. Such obligations shall not be, nor shall they be deemed to be, general obligations of the United States of America.

(l) In the exercise of his authorities pursuant to this section, the Administrator shall, consistent with the provisions of this Act, insure that benefits under this section, including financial and technical assistance, conduct of conservation demonstrations, and experimental projects, services, and billing credits, are distributed equitably throughout the region.

RATE DIRECTIVES

SECTION 7. (a) The Administrator shall establish and periodically modify rates for the sale and disposition of electric power and the transmission of non-Federal power. Such rates shall be set to recover, in accordance with sound business principles, the costs associated with the acquisition, conservation, and transmission of electric power including the amortization of the Federal investment in the Federal Columbia River Power System (including irrigation costs required to be repaid out of power revenues) over a reasonable period of years and the other costs and expenses incurred by the Administrator pursuant to law. Such rates shall be established in accordance with sections 9 and 10 of Public Law 93-454 (as amended) and the provisions of this Act, and shall become effective upon confirmation and approval by the Federal Energy Regulatory Commission on the finding that such rates (1) are sufficient to assure repayment of the Federal investment in the Federal Columbia River Power System over a reasonable

number of years after first meeting the Administrator's other costs, (2) are based upon the Administrator's total system costs including contingencies, and (3) insofar as transmission rates are concerned, equitably allocate the costs of the Federal transmission system between Federal and non-Federal power utilizing such system.

(b) The Administrator shall establish a rate or rates of general application for electric power sold to meet the general requirements of public body, cooperative, and Federal agency customers within the Pacific Northwest, and sold to utilities under section 5(b)(2). Such rate or rates shall recover the costs of that portion of the Federal base system resources needed to supply the foregoing loads until such sales exceed the Federal base system resources. Thereafter, such rate or rates also shall recover the costs of additional electric power as needed to supply the foregoing loads, first from the electric power purchased by the Administrator under section 5(b)(2) and then from new resources: *Provided*, That after July 1, 1985, the projected amounts to be charged for firm power for the combined general requirements of public body, cooperative and Federal agency customers, exclusive of amounts charged such customers under section 7(g) for the costs of conservation, resource and conservation credits, experimental resources and uncontrollable events, shall in no event exceed in total, as determined by the Administrator, during any year plus the ensuing four years, an amount equal to the power costs for general requirements of such customers if, as estimated in accordance with the following assumptions for the same five-year period:

(1) the public body and cooperative customers' general requirements had included the direct service industrial customer loads located within or adjacent to the geographic service boundaries of such public bodies and cooperatives during the applicable period;

(2) public body, cooperative, and Federal agency customers were served in the applicable period with Federal base system resources not obligated to other parties under contracts existing as of the effective date of this Act (during the remaining term of such contracts) excluding obligations to direct service industrial customer loads included in part (1) above;

(3) no purchases or sales as provided in section 5(b)(2) were made during the applicable period;

(4) all resources that would have been required to meet remaining general requirements of the public body, cooperative and Federal agency customers not met by the available Federal base system resources determined under part (2) above were resources purchased from such customers by the Administrator pursuant to section 6 or resources not committed to load pursuant to section 5(a) and were the least expensive resources owned or purchased by public bodies or cooperatives with any additional needed resources having been obtained at the average cost of all other new resources acquired by the Administrator; and

(5) the quantifiable monetary savings to public body, cooperative, and Federal agency customers resulting from actions of the Administrator under section 6 were not achieved.

Any amounts not charged to such public body, cooperative, and Federal agency customers because of this proviso shall be recovered through supplemental rate charges for all other power sold by the Administrator.

General requirements as used in this section shall be the public body, cooperative, or Federal agency customer's electric power purchased from the Administrator under section 5(a) and 5(b)(1) exclusive of any new large industrial load that was not contracted for or committed to by the customer by October 1, 1978.

(c) The rate or rates applicable to direct service industrial customers shall be established:

(1) for the period prior to July 1, 1985, at a level which the Administrator estimates will be sufficient to recover the cost of resources the Administrator determines are required to serve such customers' load and the net costs incurred by the Administrator pursuant to section 5(b)(2), based upon his projected ability to make power available to such customers pursuant to their contracts, to the extent that such costs are not recovered through rates applicable to other classes of power sold by the Administrator; and

(2) for the period after July 1, 1985, at a level which the Administrator determines by rule to be equitable in relation to the retail rates charged by the public body and cooperative customers to their industrial customers in the region (to be based upon the Administrator's applicable wholesale rates to such public body and cooperative customers and the typical margins included by such public body and cooperative customers in their retail industrial rates) but taking into account (A) the comparative size and character of the loads served, (B) the relative costs of electric capacity, energy, transmission, and related delivery facilities provided and other service provisions, and (C) direct and indirect overhead costs, all as related to the delivery of power to industrial customers: *Provided*, That the Administrator's rates during such period shall in no event be less than his rate in effect for the contract year ending on June 30, 1985.

The Administrator shall adjust such rates to take into account the value of power system reserves made available to the Administrator through his rights to interrupt or curtail service to such direct service industrial customers.

(d) In order to avoid adverse impacts on—

(1) retail rates of the Administrator's customers with low system densities, the Administrator is authorized to apply discounts to the rate or rates for such customers;

(2) direct service industrial customers using raw materials indigenous to the region as their primary resource, the Administrator is authorized to establish a special rate applicable to such customer if all power sold to such customer may be interrupted, curtailed, or withdrawn to meet firm loads in the region under contract provisions equivalent to those of present modified firm contracts.

(e) In establishing rate schedules of general application, the Administrator may establish a uniform rate or rates for sale of peaking capacity.

(f) Rates for all other firm power sold by the Administrator for use in the Pacific Northwest shall be based upon the cost of the portions of Federal base system resources, purchases of power under section 5(b)(2) and additional resources (including new resources) which, in the determination of the Administrator, are applicable to such sales.

(g) The Administrator shall allocate to power rates, as he may determine appropriate, all other costs and benefits including, but not limited to, conservation, uncontrollable events, reserves, the excess costs of experimental resources under section 6, the cost of credits granted pursuant to section 6, operating services, and the sale of or inability to sell excess electric power.

(h) Notwithstanding any other provision of this section (except the provisions of subsection (a)), the Administrator shall adjust power rates to include any additional charges arising under section 4(f), and shall allocate any revenues from such charges in a manner he determines will help achieve the purposes of section 4(f).

AMENDMENTS TO EXISTING LEGISLATION

SECTION 8. (a) Section 11(b) of Public Law 93-454 (as amended) is amended by striking the word "and" at the end of subparagraph (10), and by substituting " ; and" for the period at the end of subparagraph (11) and adding a new subparagraph (12) as follows:

"(12) making such payments, as shall be required to carry out the purposes of the Pacific Northwest Electric Power Planning and Conservation Act."

(b) Public Law 93-454 (as amended) is amended by striking subsections 13(a) and (b) and substituting the following new subsections:

"SECTION 13. (a) The Administrator is authorized to issue and sell to the Secretary of the Treasury from time to time in the name of and on behalf of the Bonneville Power Administration bonds, notes, and other evidence of indebtedness (in this Act collectively referred to as 'bonds') to assist in financing the construction, acquisition, and replacement of the transmission system, to implement the Administrator's authority (including the provision of financial assistance for conservation measures and renewable resources) pursuant to the Pacific Northwest Electric Power Planning and Conservation Act, and to issue and sell bonds to refund such bonds. Such bonds shall be in such forms and denominations, bear such maturities, and be subject to such terms and conditions as may be prescribed by the Secretary of the Treasury taking into account terms and conditions prevailing in the market for similar bonds, the useful life of the facilities for which the bonds may be issued, and financing practices of the utility industry. Refunding provisions may be prescribed by the Administrator. Such bonds shall bear interest at a rate determined by the Secretary of the Treasury taking into consideration the current average market yield on outstanding marketable obligations of the United States of America of comparable maturities, plus an amount in the judgment of the

Secretary of the Treasury to provide for a rate comparable to the rates prevailing in the market for similar bonds issued by Government corporations but not to exceed the interest rate which would be applied to such bonds if they were purchased by the Federal Financing Bank. The aggregate principal amount of any such bonds outstanding at any one time shall not exceed \$1,250,000,000 prior to October 1, 1980, and \$1,750,000,000 thereafter.

"(b) The principal of, premiums, if any, and interest on such bonds shall be payable solely from the Administrator's net proceeds as hereinafter defined. 'Net proceeds' shall mean for the purposes of this section the remainder of the Administrator's gross receipts from all sources after first deducting trust funds and the costs listed in section 11(b) (2) through 11(b)(7), 11(b)(11) and 11(b)(12), and shall include reserve or other funds created from such receipts."

(c) Public Law 88-552 (as amended) is amended by striking subsection 1(b) and inserting a new subsection 1(b) as follows:

"(b) 'Pacific Northwest' means (1) the region consisting of the States of Oregon, Washington, and Idaho, the State of Montana west of the Continental Divide, and such portions of the States of Nevada, Utah, and Wyoming as are within the Columbia River drainage basin and (2) any contiguous areas, not in excess of seventy-five airline miles from said region, which are a part of the service area of a distribution cooperative served by the Administrator on the effective date of the Pacific Northwest Electric Power Planning and Conservation Act which has a distribution system from which it serves both within and without said region."

ADMINISTRATIVE SECTIONS

SECTION 9. (a) In carrying out the provisions of this Act, the Administrator is authorized to enter into such contracts, agreements, and arrangements, including the amendment, modification, adjustment, or cancellation thereof and the compromise or final settlement of any claim arising

thereunder, and to make such expenditures, upon such terms and conditions and in such manner as he may deem necessary.

(b) The Administrator shall discharge the executive and administrative functions of his office in accordance with the policy established by Public Law 75-329, as amended, this Act and sections 302(a) (2) and (3) of Public Law 95-91. The Secretary of Energy and the Administrator shall take such steps as are necessary to (1) assure the Administrator's timely implementation of this Act and (2) enable the Administrator to operate in a sound and businesslike manner.

(c)(1) As soon as practicable after the effective date of this Act, and in no event later than nine months after the enactment of this Act, the Administrator shall, in addition to offers otherwise authorized or required in other sections of this Act, offer long-term contracts simultaneously to (A) existing public body and cooperative customers and investor-owned utilities under section 5(a); (B) Federal agencies under section 5(o)(1); (C) direct service industrial customers under section 5(c)(1); and (D) utilities under section 5(b)(2).

(2) Each customer offered a power sales contract pursuant to this subsection shall have one year from the date of offer to accept such contract. Such contract shall become effective as follows:

(A) A contract with a public body, cooperative or investor-owned utility pursuant to section 5(a) or a Federal agency pursuant to section 5(b), on the date executed by such public body, cooperative, investor-owned utility or Federal agency, unless otherwise agreed upon by the contracting parties.

(B) A contract with a utility pursuant to section 5(b)(2), on the date executed by the utility, but no

earlier than the first day of the tenth month after the effective date of this Act.

(C) A contract with a direct service industrial customer pursuant to section 5(c)(1), on the date agreed upon by the parties, but no later than the first day of the tenth month after the effective date of this Act; such contract when executed may for rate purposes be given retroactive effect to such day.

The Administrator shall be deemed to have sufficient resources for the purpose of entering into the power sales contracts specified in this subsection.

(d) Any contract of the Administrator for the sale or exchange of electric power for use outside the Pacific Northwest shall be subject to limitations and conditions corresponding to those provided in sections 2 and 3 of Public Law 88-552 (as amended), for any contract for the sale, delivery or exchange of hydro-electric energy or peaking capacity generated within the Pacific Northwest for use outside the Pacific Northwest: *Provided*, That for the purposes of this subsection, "surplus energy" shall mean electric energy for which there is no market in the Pacific Northwest at any rate established for the disposition of such energy, and "surplus peaking capacity" shall mean electric peaking capacity for which there is no demand in the Pacific Northwest at the rate established for disposition of such capacity. The authority granted, and duties imposed upon, the Secretary of Energy by sections 5 and 7 of Public Law 88-552 (as amended), shall also apply to the Administrator in connection with resources acquired by the Administrator. The Administrator, in making any determination of the electric power requirements of a Pacific Northwest customer which is a non-Federal utility having its own generation shall exclude, in addition to hydro generated energy excluded in section 3(d) of Public Law 88-552 (as amended), any amounts of energy included in the resources of such utility for service to firm loads in the region which were disposed of by the utility outside the region if and to the extent that

as the result of such disposition the firm energy requirements of such utility and other customers on the Administrator are greater than if such energy had been or reasonably could have been conserved or otherwise retained for service to regional loads.

The Administrator may sell as a replacement therefore only that which would be surplus energy.

(e)(1) For the purposes of section 701 of title 5, United States Code, and the following: acquisition of resources, granting of credits under subsection 6(h), assistance to sponsors under subsection 6(f), sales of electric power under section 5 (a) through (c), implementation of conservation measures, adoption of the plan or amendments thereto insofar as the plan or such amendments relate to specific resource acquisition or conservation decisions, determinations of the Administrator of the Council under section 4(d), and rate determinations under section 7 shall be final actions subject to judicial review. The record upon review shall be limited to the administrative record compiled in accordance with this Act. The scope of review shall be governed by section 706 (1) and (2) (A) through (D) of title 5, United States Code, except that review of rate determinations under section 7 shall be on the basis of substantial evidence on the record. The adopted plan or portions thereof shall not be reviewable as a part of a review of a resource acquisition decision or a conservation measure implementation decision.

For purposes of this subsection, (A) resources shall be deemed to be acquired upon publication in the Federal Register of the Administrator's section 6(b) determination or section 6(c)(2) written statement; (B) conservation measures shall be deemed to be implemented upon publication in the Federal Register of the determination required of the Administrator pursuant to section 6(a); and (C) the plan or amendments thereto shall be deemed to be adopted upon adoption by the Council and publication of notice of

adoption in the Federal Register pursuant to section 4(d), or as otherwise provided for by this Act.

(2) Suits brought to challenge final actions taken pursuant to this Act, or the implementation of such final actions, whether brought pursuant to this Act or Public Law 75-329 (as amended), or Public Law 88-552 (as amended), or Public Law 93-454 (as amended), shall be commenced within ninety days of the action, or, if notice of the action is required by this Act to be published in the Federal Register, within ninety days of such notice, or be barred.

(f) For the purpose of enabling the Administrator to acquire resources from State or local governmental units at a cost no greater than the costs which would be applicable in the absence of such acquisition, the exemption from gross income of interest on certain governmental obligations provided in section 103(a)(1) of title 26 of the United States Code shall not be affected by the Administrator's acquisition of such resources if the Administrator, prior to contracting for the acquisition, certifies to his reasonable belief, in accordance with a procedure approved by the Secretary of the Treasury, as to the persons for whom the Administrator is purchasing such resources for sale pursuant to section 5 of this Act and as to the amount for each such person, and if, based upon such certification, which shall be conclusive as to the facts stated therein, the Secretary of the Treasury determines that less than a major portion thereof is to be furnished to persons who are not exempt persons as defined in section 103(b) of such title.

(g) When reviewing rates for the sale of power to the Administrator by an investor-owned utility under sections 5(b)(2) and 6, the Federal Energy Regulatory Commission shall convene a joint State board pursuant to section 209 of the Federal Power Act (16 U.S.C. 824h), and shall

invest such board with such duties and authority as will assist the Commission in its review of such rates.

(h) No "company" (as defined in section 79b(a)(2) of title 15, United States Code), which owns or operates facilities for the generation of electricity (together with associated transmission and other facilities) primarily for sale to the Administrator under section 6 shall be deemed an "electric utility company" (as defined in section 79b(a)(3) of title 15, United States Code), within the meaning of any provision or provisions of chapter 2C of title 15 of the United States Code: *Provided*, That the Administrator shall have approved the organization of such "company" and all material contracts entered into by and between such "company" and any sponsor company: *Provided further*, That (1) participation in any facilities of such "company" shall have been offered to public bodies and cooperatives in the region pursuant to subsection 6(c)(5), and (2) the Administrator shall include in any contract for the purchase of a major resource from such "company" provisions limiting the amount of equity investment, if any, in such "company" to that which the Administrator determines will be consistent with achieving the lowest attainable power costs attributable to such major resource. This subsection shall continue to apply to any such "company" unless the Administrator or the Securities and Exchange Commission determines that the "company" no longer operates in accordance with this subsection, and notifies the "company" in writing of such determination, in which event this subsection shall cease to apply to such "company" thirty days after receipt of such notification.

SAVINGS PROVISIONS; WAIVERS OF PREEMPTION

SECTION 10. (a) Nothing in this Act shall alter, diminish, or abridge the right of any State or political subdivision thereof to (1) determine retail electric rates except as provided by section 5(b)(2); (2) develop and implement

its own plans and programs for the conservation, development and use of electric power resources or facilities; or (3) make energy facility siting decisions including, but not limited to, determining the need for a particular facility, evaluating alternative sites, and considering alternative methods of meeting the determined need.

(b) Nothing in this Act shall alter, diminish, or abridge the authorities or obligations of the Administrator granted by or arising under any other applicable statute, unless otherwise specifically provided herein.

(c) Nothing in this Act shall alter, diminish, or abridge the rights and obligations of the Administrator or any other party under any contract or agreement existing as of the effective date of this Act.

(d) Nothing in this Act shall alter, diminish, abridge or otherwise affect the provisions of other Federal statutes by which public bodies and cooperatives are entitled to preference and priority in the sale of federally generated electric power.

(e) Nothing in this Act shall alter, diminish, or abridge the authority of the Administrator to meet with his customers or with other groups or individuals in order to discuss regional power issues or other matters of interest or concern.

(f) Nothing in this Act shall (1) affect the jurisdiction of the States and the United States over waters of any stream or over any ground water resource, (2) alter, amend, repeal, interpret, modify, or be in conflict with any interstate compact made by any States, or (3) confer upon any non-Federal entity the ability to exercise any Federal right to the waters of any stream or to any ground water resource.

(g) The reservation under law of electric power for use in the State of Montana by reason of the construction of

Hungry Horse and Libby Dams and Reservoirs within that State, plus 50 per centum of any electric power produced at Libby Reregulating Dam when built, is hereby affirmed. Electric power so reserved shall be sold at the rate or rates set pursuant to section 7.

PURPOSE

S. 885 has several major elements:

- To establish a procedure for the Bonneville Power Administration to participate with regional entities in a public planning process to coordinate the provision of electric power resources to meet the needs of the region.
- To extend the benefits of the Federal Columbia River Power System to the residential and farming consumers of investor-owned utilities.
- To supplement the authority of the Bonneville Power Administration to utilize regional power revenues to assist in the financing of future conservation measures and electric power supply resources development in the region.

SUMMARY OF MAJOR PROVISIONS

As amended, S. 885 addresses several major issues related to power problems in the Pacific Northwest, and in some instances would mandate significant departures from past or present practice. Major issues and related provisions of the bill are briefly described as follows:

PUBLIC PARTICIPATION AND CONTROL

Section 4 establishes a Pacific Northwest Electric Power Planning Council to consist of the Administrator of the Bonneville Power Administration and four appointees of the Governors of the States in the region. Using the procedures of the Administrative Procedures Act, the Council is to prepare and adopt a regional electric power plan that will govern most regional conservation efforts and re-

source acquisitions of the Administrator. The composition, duties and functions of the Council and other public participation provisions are primarily contained in section 4.

PREFERENCE

The preamble of section 5 makes all Bonneville power sales subject to the preference and priority provisions of the existing Bonneville Project Act. Public bodies and cooperatives entitled to preference and priority under that Act may not be subjected to restriction on the amount of power sold them unless and until their loads exceed the amount of Federal base system resources. Section 7(b) provides that rates charged such public bodies and cooperatives may not exceed a limit designed to reflect the power costs such public bodies and cooperatives would have experienced in the absence of this legislation. Section 10(d) preserves the general preference and priority to which public bodies and cooperatives are entitled under other statutes governing the sale of power from federally-owned generating facilities.

ALLOCATION

Sections 5 and 7 contain most provisions related to allocation of the Administrator's existing and newly acquired power and related power costs. Public bodies and cooperatives entitled to preference and priority under the existing Bonneville Project Act are to receive new requirements contracts that provide power at the Administrator's lowest rate (except power needed to serve new large industrial loads). Investor-owned utilities are to receive requirements contracts that provide power at a new resources rate, and are permitted to exchange with the Administrator an amount of power sufficient to serve their residential and small farm loads. The latter power will also be sold at the Administrator's lowest rate, with the cost benefits of the exchange required to be passed through directly to the residential and farm consumers involved. Direct-service

industrial customers of the Administrator may surrender existing contracts providing low-cost power in order to receive new long-term contracts, but at substantially higher rates. Such higher rates are to recover to the Administrator his additional costs incurred in making the power exchange with the investor-owned utilities.

ACQUISITION OF RESOURCES

Section 6 grants new authority to the Administrator to acquire resources, including conservation, to meet the loads of his customers. This authority is granted subject to the requirement that the Administrator make such acquisitions subject to the plan developed by the Council in section 4. In the absence of a regional electric power plan or if a proposed resource acquisition is inconsistent with the plan a special procedure, including specific approval of a major resource acquisition by Act of Congress, is provided.

CONSERVATION AND RENEWABLE RESOURCES

Section 4 and 6 require conservation to be treated as the region's first priority resource, and renewable resources to be treated as the second priority resource, ahead of all other resource types. Sections 4 (e) and (f) require model conservation standards to be adopted as part of the Council's regional plan. Savings from such standard are to be assured by rate surcharges, if recommended by the Council, of up to 50 percent in the event of nonattainment of expected load reductions.

The Administrator is required under sections 4 and 6 to rely upon conservation to the maximum extent it is feasible and cost effective, to provide financial assistance for conservation and renewable resource purposes, and to continue conservation efforts even if he possesses an adequate supply of power. The existing Bonneville Power Administration borrowing authority is increased by \$500,000,000 under section 8(a) to aid in the initial fund-

ing, after fiscal year 1980, of conservation and renewable resource efforts, as well as other resource activities. Conservation measures, which are treated as a resource, are to be compared with other resources available for acquisition. Conservation resources are to be considered cost-effective under section 3(c) if their life-cycle incremental system costs are less than or equal to 110 percent of the life-cycle incremental system costs of alternative nonconservation resources. The Administrator is required under section 6(h) to grant rate credits to utilities or local governments for conservation efforts that will achieve extra savings, and for renewable resources or multipurpose projects which reduce demand on the Administrator and allow the Administrator to avoid acquiring other resources.

OTHER POWER RESOURCES

Sections 4 and 6 require conventional fueled generating resources, including coal and nuclear, to be treated as the region's lowest priority resources. Section 6(c) sets forth a detailed procedure for the acquisition of any major resource and for acquisitions which are either inconsistent with the regional plan or which are made when a regional plan is not yet adopted; specific approval by Congress is required if no plan is in effect or the proposed acquisition is inconsistent with the plan. Section 6(h) prohibits rate credits being granted to utilities for major resources unless such credits are not inconsistent with the plan or Congressional approval is obtained. The cost-effective determination under section 3(c) would consider all costs associated with conventional resources, including the applicable waste disposal costs, end-of-cycle costs, and fuel costs, among other costs.

FINANCING PROVISIONS

In section 2(c), Congress finds that Northwest ratepayers should continue to pay all costs necessary to meet the region's electric power requirements, including repayment

with interest of the Federal investment in the Federal Columbia River Power System. Section 6(k) prohibits Federal "guarantees" of new investments and requires that all obligations of the Administrator incurred under this act be secured solely by his revenues from the sale of power and other services. This provision makes explicit in this act the self-financing requirement of the Federal Columbia River Transmission System Act of 1974, Public Law 93-454 (as amended). Section 8(a) increases Bonneville's present borrowing limit from \$1.25 billion to \$1.75 billion. Section 9(f) preserves the tax-exempt status of obligations issued by State and local governments to finance resources that may be acquired by the Administrator primarily for the needs of such entities.

BACKGROUND

The Bonneville Power Act of 1937 (Act of August 1937, 50 Stat. 731), authorizing the construction of the Bonneville Dam by the Corps of Engineers, provided that the electric power generated at the dam should be marketed by a Bonneville Power Administrator to be appointed by the Secretary of the Interior. The Administrator was authorized to construct, operate, and maintain transmission lines necessary to market the power. The Administrator was not authorized to construct or operate either hydro or thermal electric generating facilities.

The Bonneville Power Administration, through subsequent legislation and interpretation of the Act, has become a major part of the electric power system in the Pacific Northwest. The Federal Columbia River Power System, for which BPA is the marketing agency, had 30 hydroelectric power projects in operation in 1978, with a total generating capacity of 16,441 megawatts. In that year, the system (including federally acquired thermal) generation represented 54 percent of the region's total electric generation. The BPA transmission system includes 12,454 cir-

cuit miles with an additional 1,652 miles in various stages of design and construction. The BPA transmission system, containing 80 percent of the region's primary transmission system, forms the backbone for what constitutes a regional grid.

Traditionally, the Pacific Northwest's power needs have been satisfied by the energy produced by large hydroelectric projects. For the most part, the projects were constructed and operated by the Federal Government with the power marketed through the Bonneville Power Administration. However, some of the larger utilities built and operated their own generating facilities and purchased part of their regional power needs from BPA. In the late 1960's projections of future regional power needs by the Bonneville Power Administration indicated that by the mid-1970's, regional loads would exceed system capacity. As a result, in 1969 the "Hydrothermal Power Program" was initiated in the region in an effort to provide an orderly transition from a hydro based system to one using a blend of hydro and thermal resources. By 1970, rising costs associated with thermal plant construction and BPA's inability to acquire thermally generated resources indicated that an alternate to the Hydrothermal Power Programs would be needed if future regional needs were to be met.

By 1973, BPA stopped selling firm low-cost hydro power to investor-owned utilities because of inadequate supplies and the utilities turned to higher cost thermal power. Public utilities also realized that they too faced problems in meeting future demands when in 1976 the BPA issued notices of insufficiency to all public utilities and direct service customers, stating that BPA would not be able to meet new load requirements after 1983. Concern for future sources of electric power lead public and private utilities, industries, and customers to seek legislative assistance from the Congress.

NEED FOR THE LEGISLATION

As reported, S. 885 addresses problems associated with the future of electrical energy production and consumption in the Pacific Northwest as identified by interested regional entities. Critical in the problems facing the Northwest are the needs to initiate and carryout a comprehensive regional electric energy conservation program, to extend to residential and rural consumers the benefits of the Federal Columbia River Power System, and to assure future electric supplies for consumers at reasonable rates. Paramount in achieving these goals is the establishment of a mechanism providing for an effective region-wide planning process. S. 885 mandates the preparation of a regional electric energy plan and assures that such a plan will reflect and be responsive to the diverse interests represented in the region.

Traditionally, utility planning in the Pacific Northwest has been geographically fragmented. While in other parts of the Nation large areas may be served by a single utility which generates and distributes electric energy on an area-wide basis, the Pacific Northwest has been served by a myriad of small- to medium-sized utilities, which, for the most part, have relied upon the generation and transmission resources of the Federal Columbia River Power System. In spite of this fragmentation, the FCRP, the Bonneville Power Administration, and the distinct needs and resources of the region have served to facilitate a high degree of cooperation between utilities in forecasting regional power requirements and the integration of available resources. However, seriously lacking in the region is a comprehensive planning process providing for the integration of new generating facilities on a regional basis and a lack of opportunity for State and public participation at an early stage in the planning process. The regional electric energy plan which would be prepared pursuant to the

Pacific Northwest Electric Power Supply and Conservation Act is conditioned upon these, and other premises.

Without the planning framework and authorities contained in S. 885, the region faces potentially damaging power shortages, an inability to involve on a formalized basis the States and various interest groups in the region in the planning process, and a lack of direction for and financing of a truly regionwide conservation plan which would not only benefit the individual consumers in the area, but could serve as a model for the rest of the Nation as well.

LEGISLATIVE HISTORY

In the 95th Congress, on September 9, 1977, S. 2080, the Pacific Northwest Electric Power Supply and Conservation Act was introduced by Senator Jackson at the request of a group of utilities and industrial users of electric power in the Pacific Northwest. S. 2080 and other various other power planning proposals were the subject of extensive regional discussion and debate, and in April and May of 1978, the Senate Committee on Energy and Natural Resources conducted 4 days of field hearings in the Pacific Northwest on the regional power issue. As evidenced by the record, S. 2080 did not represent a consensus of all interested groups in the region. A redraft of the measures, which recognized many of the concerns expressed in the region, was prepared and was introduced on August 16, 1978, as S. 3418, by Senators Jackson, Magnuson, Church, Hatfield, Packwood and McClure. Hearings on S. 3418 by the Committee on Energy and Natural Resources were held in Washington, D.C. on August 24 and 25, 1978. The 95th Congress adjourned prior to completion of consideration by the Committee of S. 3418.

On April 5, 1979, S. 885 (identical to S. 3418 of the 95th Congress) was introduced by Senators Jackson, Magnuson, Church, Hatfield, McClure and Packwood. Hearings on

S. 885 were held in Washington, D.C. on May 23 and 24, 1979, before the Committee on Energy and Natural Resources. On July 18 and July 27 the measure was considered by the full Committee and was ordered reported with an amendment in the nature of a substitute on July 27, 1979.

Related legislation is presently pending before the House Committee on Interior and Insular Affairs.

COMMITTEE RECOMMENDATION AND TABULATION OF VOTES

The Senate Committee on Energy and Natural Resources, in open business session on July 27, 1979, by majority vote of a quorum present, recommended that the Senate pass S. 885, if amended as described herein.

The roll call vote on reporting the measure was 14 yeas, 0 nays as follows:

YEAS

NAYS

Jackson
Church
Johnston
Bumpers
Ford*
Durkin
Metzenbaum
Matsunaga*
Melcher
Tsongas
Bradley
Hatfield
McClure
Domenici
Stevens

*Indicates vote by proxy

SECTION-BY-SECTION ANALYSIS COMMITTEE AMENDMENT

The Committee struck all after the enacting clause of S. 885 and inserted a substitute text in lieu thereof.

Among the changes the Committee substitute makes are the following:

- Definitions of "Council", "customer", "direct service industrial customer", "major resource", "new large industrial load", "plan", and "reserves" are provided in section 3.
- The definition of "cost effective" is substantially expanded in section 3.
- A Pacific Northwest Electric Power Planning Council is established in Section 4 in place of the Bonneville Consumers' Council and Bonneville Utilities' Council of S. 885, as introduced. The Planning Council, consisting of four representatives of the Governors of the States of the region and the Bonneville Power Administrator, is authorized to direct preparation of a regional power plan, among the components of which will be a 20-year load forecast, a scheme for resource acquisitions by the Administrator to meet such loads, and model conservation standards to set the norm for the region in achieving load reductions which will be the priority power-related resource. Public involvement in plan development through regional hearings is mandated.
- The involvement of State and Federal fisheries agencies and affected Indian tribes in plan preparation is provided for in section 4.
- Specific references to the preference and priority provisions of the Bonneville Project Act for the benefit of public bodies and cooperatives are made in section 5 so as to apply clearly to all power sales of the Administrator from the Federal base system.

- Conditions of the power exchange between Bonneville and the investor owned utilities for the purpose of serving their residential and farm loads are spelled out in section 5, and the components of the IOU average system cost of power sold to BPA under this exchange are limited.
- A limitation on Bonneville serving new direct service industries is provided in section 5.
- Specific procedures for the acquisition of major resources by the Administrator are provided in section 6. Assurance is also provided that all utilities in the region will have reasonable opportunity to participate in sponsorship of new resources to meet their loads.
- The Administrator is authorized or directed in section 6 to grant billing credits under certain conditions for resources, pursued by utilities and political subdivisions, that he does not acquire.
- Oversight requirements of the Administrator in matters pertaining to development of resources he has committed himself to acquire are enumerated in section 6.
- The securing of the Administrator's obligations is limited in section 6 to the extent of his revenues from power sales and other services he performs.
- A rate test is provided in section 7 to insure that the Administrator's power rates for public bodies and co-operatives entitled to preference and priority under the Bonneville Project Act or no greater than would occur in the absence of the regional program established in S. 885.
- The Administrator is authorized in section 7 to offer one of his direct service industrial customers a special rate, if that customer—the Hanna nickle plant in Riddle, Oregon—accepts a contract in which its entire

power supply is interruptible, as is the case under its present contract, and would not be the case under new DSI contracts otherwise anticipated under this act. He is also authorized to establish special rates for utilities with low system densities.

- The anti-trust exemption provided for the operation of the Utilities' Council in section 9 of S. 885, as introduced, is struck.
- Provisions governing judicial review appear in Section 9.
- A joint state-FERC board is provided for in Section 9 to review rates for sales of power to the Administrator.
- A series of savings clauses is provided in Section 10 to preserve State siting and utility rate regulation authority, BPA authorities under other acts, rights of parties with present contracts with the Administrator, preference and priority for public bodies and cooperatives under all federal statutes where it is provided, the Administrator's authority to meet with his customers or other groups or individuals, the jurisdiction of the states and the United States over stream waters and ground waters, and the Hungry Horse power reservation for Montana.

SECTION-BY-SECTION ANALYSIS

Section 1.—Self-explanatory.

Section 2(a).—Self-explanatory.

Section 2(b).—This subsection lists entities and individuals whose participation and consultation Congress finds to be essential in the development of a regional power plan and programs related to it. The "fisheries agencies" mentioned here are intended to include Federal and State agencies and appropriate Indian tribes to the extent that they have particular responsibility for anadromous fisheries of the Columbia River and its tributaries. It is intended that

all States in the Pacific Northwest should be consulted in the planning process, including those States which are only partially within the region as defined in paragraph 3(k) (1).

Section 2(c).—Self-explanatory.

Section 3(a).—Self-explanatory.

Section 3(b).—The term "conservation" is defined as any reduction in electric power consumption that results from increased efficiency of energy use, production or distribution. This definition is intended to distinguish "conservation", as the term is used in this act, from curtailments of power consumption that do not involve long-term reductions in demand or increased efficiency, and from renewable resources (e.g., solar panel water heating systems) that reduce consumption through direct application.

Section 3(c).—The term "cost effective" is defined to enable cost comparisons among and between alternative conservation measures and resources. A "cost-effective" conservation measure, or any resource, must be forecast to be available for and during the period when it is needed. Cost comparisons of conservation measures and resources are to be made on the basis of their estimated incremental system cost on a per-unit basis for the amount of power produced or conserved. The section provides that a conservation measure or resource is "cost effective" for purposes of the act if its estimated incremental system cost, determined in accordance with this section, is no greater than that of the least-cost alternative conservation measure or resource that is similarly available. The proviso is designed to insure that all direct system costs are included in this comparison, and that such costs are estimated for the full life-cycle of the compared conservation measures and resources. The Council is directed to develop a methodology for determining what quantifiable environ-

mental and social costs and benefits are directly attributable to a conservation measure or resource, and this section directs the Administrator to use that methodology in determining which such costs and benefits to include in the cost of effectiveness comparisons. The further proviso of this section is designed to permit a conservation measure to be determined to be "cost effective" even if its estimated incremental system cost is up to 10 percent greater than that of the least-cost, similarly available, nonconservation resource.

Section 3(d).—Self-explanatory.

Section 3(e).—This definition distinguishes "customers"—those with contracts to purchase power from the Administrator—from consumers who buy power from a utility or other similar entity. In general, the distinction is between wholesale and retail purchasers.

Section 3(f).—A list is included in Appendix A of direct service industrial customers which the Committee intends shall be offered long-term contracts pursuant to paragraphs 5(c)(1) and 9(c)(2).

Section 3(g).—The term "electric power" is defined using a standard, utility definition.

Section 3(h).—The term "Federal base system resources" is defined to include three components. First are the Federal Columbia River Power System hydroelectric projects, both existing and future. Second are resources acquired by the Administrator under long-term contracts in force on the effective date of this act, a category including the net-billed thermal plants, other specific generating resources and electric power the Administrator is entitled to receive from the utilities within and outside the region in exchange for services or other consideration. Third are resources acquired to replace reductions in the capability of resources in the first two categories.

Section 3(i).—Self-explanatory.

Section 3(j).—The term “new large industrial load” is defined in terms of load type and load size. Industrial load types to which the definition applies are those of (1) a new plant, (2) an expansion of an existing plant, which includes any type of load increase, and (3) an existing plant load served by a public body, cooperative or Federal agency customer contracted for or committed to on or after October 1, 1978. The foregoing loads are to be considered “new large industrial loads” if they result in an increase in load in excess of 10 average megawatts during any 3-year period. Additionally the Council may recommend to the Congress a different limit which would become effective only upon an act of Congress.

Section 3(k).—The term “Pacific Northwest”, and the terms “region” or “regional” are defined for the purposes of this act. A corresponding amendment to conform the definition included in Public Law 88-552 is provided in section 8(c) of this act.

Section 3(l).—Self-explanatory.

Section 3(m).—The term “renewable resource” is defined to include but is not limited to the utilization of solar, wind, hydro, geothermal, and biomass energy sources. A renewable resource could be utilized by direct application to reduce or displace an electric power load which the Administrator would otherwise be obligated to serve. Alternatively, a renewable resource could be used to generate electric power. Geothermal energy, while not always technically renewable, is included as a renewable source of energy by this section.

Section 3(n).—The term “reserves” is defined as electric power needed to avert particular planning or operating shortages, for the benefit of firm power customers, and available to the Administrator from specifically identified resources or rights. In this section, the term “firm power

customers of the Administrator" is intended to mean the firm power loads of such customers. It is not intended that the Administrator's reserves will be used to protect other than firm loads.

Section 3(o).—The terms "residential use" and "residential load" are defined in terms of "usual" residential, apartment, seasonal dwelling and farm electrical loads or uses. The word "usual" is intended to exclude loads or uses more properly considered commercial or industrial in nature, such as process loads. Only the first 400 horsepower of the irrigation or pumping load of any single farm is to be treated as a "residential use" or "residential load."

Section 3(p).—The term "resource" is defined to include the actual or planned capability of generating facilities, or the actual or planned load reduction resulting from direct application of a renewable energy resource, or from a conservation measure. While the phrase "actual or planned capability" is meant to include the planned output of a generating facility, whether or not operating or operable in whole or in part, and the planned load reduction of direct-application renewable resources or conservation measures, whether or not such resources or measures ultimately meet expectations, it is not intended that the Administrator be authorized to acquire any resource which he knows at the time of acquisition will not operate, or will not reduce load, as the case may be.

Section 4(a).—This section establishes a five member Pacific Northwest Electric Power Planning Council. Appointments by the Governors are to be made under applicable State laws, including in particular any existing or future state law dealing with confirmation of gubernatorial nominees by State legislatures.

Section 4(b).—This section establishes procedures for Council decisionmaking. Adoption of the regional electric power plan or an amendment to the plan requires the affir-

mative vote of the Administrator and at least two other members.

Section 4(c).—It is intended that funding under this section will be applied to meet expenses directly connected with each state's and its representative's participation in and support of the Council activities. Such funding must be approved by the Council, although the Administrator's vote is not required for approval, and shall be included in the Administrator's annual budget submitted pursuant to Public Law 93-454. The limit on the total of such funding for all States is established at 0.02 mills per kilowatt-hour of estimated power sales of the Administrator; it is intended that such sales figures will be based on the Administrator's estimate of his total firm loads.

Section 4(d).—This section sets forth the procedures for, and content of, the regional electric energy plan and its adoption, as well as the plan's relationship to the activities of the Administrator. The Council is to direct preparation of the plan, and to adopt a plan within 2 years of the effective date of this act; it is intended that the Administrator fully utilize his expertise and staff to assist the Council in this effort and in any subsequent effort to amend the plan. The Council is to identify promptly the major subject areas of the first plan and commence regional hearings. A second set of hearings, on the proposed plan, is to be held prior to Council action to adopt a final plan. The Council is to conduct a review of the plan no less frequently than once every 5 years. Such review should commence again with regional hearings on the major subjects of the plan and conclude with hearings on a proposed new plan and adoption of a new plan. Amendments to the plan may be made from time to time and are not to be considered a review of the plan unless the process set forth for the periodic review is followed. Public hearings are required in each of the four States represented on the Council, and in other States within the region (i.e., Wyoming, Nevada or Utah) if such States are

probable sites of major resources for acquisition in accordance with a plan or plan amendment. The hearings shall be conducted in accordance with section 553 of title 5, United States Code.

The second paragraph of this section sets forth the role of the plan in guiding the actions of the Administrator, and specifies the procedures the Administrator shall follow if no plan is in effect or if a proposed implementation of a conservation measure or acquisition of a resource is not consistent with the plan. The Administrator is to follow the direction and intent of the plan in implementing the new authorities granted him under this act, to the maximum extent feasible. He is to notify the Council promptly of any actions not consistent with the plan, and provide the Council his justification for such actions; this mandatory obligation is intended to supplement the intended regular communication between the Administrator and other members of the Council. A majority vote of the full Council may independently determine whether an action of the Administrator under sections 6(a) through (d), (f) or (h) is consistent with the plan if the Council so determines within 60 days of the Administrator's determination of consistency, and the Council's determination shall control.

A proposed implementation of a conservation measure or acquisition of a resource may be undertaken by the Administrator in the absence of a plan or despite a determination of inconsistency with the plan only under the procedures set forth in sections 6(a) through (c).

The Committee recognizes the administrative difficulties which would be involved if the plan became a highly detailed operational document. It is intended that the plan will not be a highly detailed operational document but instead will be a broad policy document which addresses major issues involved in planning and development of resources including conservation.

Section 4(e).—This section sets forth the conservation and resource priorities to be used in the plan, and lists the elements of the plan.

The elements of the plan are specified in section 4(e) (1) and (2), along with considerations that should guide the Council's development of the plan. A general scheme for implementing conservation and developing resources, as well as more specific items such as model conservation standards, a 20-year load forecast, and a methodology for determining average system cost for resources exchanged under section 5(b)(2) are among the most significant required features of the plan. The plan is not intended, however, to inhibit the Administrator's ability to act in a businesslike and timely manner to carry out the purposes of this act and other applicable statutes.

Section 4(f).—This section governs the model conservation standards to be included in the plan. It is intended that the Council promulgate the standards with technical assistance from the Administrator. The standards are to include those applicable to (1) structures, (2) conservation programs of customers, local governments and others, and (3) other consumer actions for achieving conservation. The standards are to be designed to produce all power savings that are "reasonable, feasible and cost-effective to consumers"; the term "cost-effective to consumers" is intended to mean that the cost of complying with the standards, adjusted to take into account cost savings made possible by conservation financial assistance programs, should not exceed, for the individual or entity to which the standards apply, the direct financial savings produced by compliance.

Upon the recommendation of the Council by majority vote of the full Council the Administrator may, to the extent recommended by the Council, impose the specified rate surcharges either for failure to adopt the standards, or for failure in lieu of such adoption to achieve equivalent conservation savings through other means. It is not intended that the Administrator investigate or monitor the conserva-

tion activities or compliance with conservation standards of individual performance of his customers and of political subdivisions within the region, when the Council has recommended implementation of the standards.

Section 4(g).—This section mandates widespread public involvement and public participation programs to be carried out in the region by the Administrator, including programs in cooperation with the Council. It is not intended that these programs be duplicative of the public involvement and participation procedures to be followed prior to adoption of the plan or a plan amendment. Each State is encouraged to establish public involvement and participation programs, including advisory committees, of its own to assist the State's representative in performing Council duties. This section also authorizes the Administrator to form advisory committees as he deems appropriate; such committees would be subject to the Federal Advisory Committee Act, but it is not intended that that act apply to or interfere with the Administrator's normal meetings and contacts with customers, groups of customers, or other individuals or groups within or without the region.

Section 4(h).—This section formalizes the procedure for insuring that the recommendation of fisheries agencies and appropriate Indian tribes are taken into account in the development of the regional plan and plan amendments. The section requires the Administrator, after a plan has been adopted or amended which includes such measures to (1) include funds for fisheries research and development in his annual budget to be acquired from the Bonneville Power Administration Fund or from appropriations, and (2) acquire and dispose of power, and utilize the flexibility of the resources available to him, in a manner that will assist in the preservation of the anadromous fisheries resources while meeting his other obligations.

It is intended that the recommendations of the fisheries agencies and Indian tribes deal with matters within the

practical capabilities of the Administrator and the Council. Any activities funding provided by this authority are not intended to be substitutes for the usual State and Federal fisheries programs.

SECTION 5

The preamble to section 5 is one of several savings provisions which appear in the bill to preserve the "preference clause" of the Bonneville Project Act. The Committee is aware of no inconsistency between the provisions and intent of this Act and the existing preference clause of the Bonneville Project Act. The Committee is aware of no consistency between the provisions and extent of this Act and the existing preference clause of the Bonneville Project Act. This Act and the "preference clause are expected to operate in a mutually compatible manner.

Section 5(a).—This section governs power sales to public bodies and cooperatives entitled to preference and priority under the Bonneville Project Act, and to investor-owned utilities. The term "public body and cooperative entitled to preference and priority" under that act is used here to avoid any change in determining the entities entitled to preference and priority under the Bonneville Project Act.

The Committee decided against requiring a single comprehensive definition by statute or regulation of "firm power load" and "firm resources" because the complexity of the terms would make such a definition extremely lengthy and unnecessarily inflexible. The Committee does, however, intend that for the purposes of this act there should be consistency in the application of these terms in contracts so that the Administrator's customers will be equitably treated.

The section sets forth the manner in which the firm resources of individual customers is to be determined. For purposes of that determination, the term "firm power load"

is intended to mean the power the customer is obligated to make continuously available to its purchasers (subject to the effect of any *force majeure* or uncontrollable events clauses), and the term "firm resources" is intended to mean the electric power suitable for providing service to firm power loads. These terms are used commonly by and among the Administrator and his customers and have been included and defined in the Administrator's contracts, and are intended to be incorporated in new contracts offered under this act.

Consistent with the provisions of this act, restrictions on sales imposed in the event of a planning insufficiency are to be equitably distributed throughout the region. A determination to restrict sales shall not be made until the provisions of the act are given an opportunity to function in the manner contemplated. The Committee recognizes that various classes and categories of customers have different rights to power. For example, preference customers have certain rights to the Federal base system resources, and all utilities have certain rights to what they contribute to the regional system through exchange sales under section 5(b)(2) and sales of resources to the Administrator pursuant to section 6. The Committee intends that utilities be able to plan dependably for their power supply and, recognizing the differing rights of various classes and categories of customers, that the criteria applicable to such customers be consistently applied throughout the region. It is expected that the Administrator will give customers reasonable notice of a restriction on his obligation to meet existing requirements and increases in their projected requirements. It is expected that the Administrator will include provisions in contracts tendered pursuant to this act which may be necessary to carry out these purposes.

Section 5(b)(1).—This section permits the Administrator to sell power to Federal agencies in the region, as he does under present law.

Section 5(b)(2).—This section governs the exchange power sales between the Administrator and the utilities, and the determination of the costs of such power sold by the utilities. In the four-part proviso, part (C) permits a utility to terminate such exchange sales under specified circumstances. It is intended that the Administrator include in contracts implementing this section provisions governing termination and resumption of any previously-terminated exchange, for the purpose of minimizing disruption of the Administrator's rate-making or power marketing programs or planning.

The Committee adopted an amendment to make it clear that the Administrator must offer to enter into exchange power sales under Section 5(b)(2) whenever a Pacific Northwest utility makes an offer to sell power to the Administrator which meets the criteria of that subsection. Subpart (D) of the proviso in Section 5(b)(2) allows the Administrator to carry out the exchange power sales by purchasing power other than that offered by the exchanging utility if it is available at lower cost.

The paragraph following the proviso contains a list of costs to be excluded in the determination of "average system cost"; additional exclusions may be incorporated in the methodology for determining average system cost under this section.

Average system cost as used in section 5(b)(2) does not include, among other costs, "the cost of additional resources in an amount sufficient to meet any additional load outside the region occurring after the effective date of this Act." If a utility acquires a resource in part to serve a load in the region and in part to serve an additional load outside the region the costs of that portion of the resource used to serve a regional load would be included in average system cost but the portion used to serve the additional load outside the region could not be included. The Administrator is required to determine "average system cost" on the basis

of a methodology developed by the Council as part of the regional electric power plan. The Administrator is required to develop an interim methodology for determination of average system cost prior to the adoption of the plan.

To assure that the full cost benefit of the exchange power sales authorized by section 5(b)(2) are passed on to residential ratepayers in the region the Committee adopted a provision making a pass through an explicit condition of such sales. Where a utility service area within one State is partially within and partially without the region the quantity of power marketed through section 5(b)(2) is limited by existing law reaffirmed in this act to an entitlement based on residential loads within the regional BPA service area. In such cases, to avoid conflict with State ratemaking authority the Committee adopted a proposal to permit a State regulatory body to require that exchange power sale benefits be distributed among all of such utility's residential loads in that State. In the absence of this provision the mandatory pass through would have conflicted with Montana State law which expressly bars rate discrimination based on geography. This provision is consistent with the existing law and policy with respect to BPA sales to regional investor owned utilities and it assures that both the regional river basin marketing policy and State ratemaking laws are preserved.

Section 5(c)(1).—This section governs power sales to direct-service industries which have contracts on the effective date of this act (see list in Appendix A). The amount of power to which such customers are entitled under present industrial firm contracts includes contingent allowances, made available at the discretion of the Administrator, for technological improvement purposes other than plant expansion. The terms and conditions under which such allowances may be provided are intended to be specified in contracts, and the allowances are intended to be available throughout the term of the new contracts.

The power quality provided the direct-service industries is determined by the reserve obligations set forth in their contracts in order to protect service to firm loads of the Administrator. It is intended that these contracts at least provide peaking power reserves similar to those provided in the present contracts, and that the energy reserves shall include a reserve approximately equal to 25 percent of the direct service industrial load to protect firm loads for any reason, including low or critical streamflow conditions, and an additional energy reserve of approximately the same amount to protect firm loads against the delayed completion or unexpectedly poor performance of regional generating resources or conservation measures, and against the unanticipated growth of regional firm loads. One intended result of these procedures is that there will be no increase in firm power commitments to the direct service industrial customs, except for technological improvements purposes.

Section 5(c)(2).—Self-explanatory.

Section 5(d).—Self-explanatory.

Section 6(a).—This section requires the Administrator to implement conservation measures, including but not limited to financial assistance for insulation and weatherization, increased system efficiency, and waste energy recovery by direct application. Financial assistance also includes technical assistance to consumers.

Waste energy recovery by direct application includes measures such as the recovery of heat produced in lighting or industrial processes and use of the recovered heat to reduce space heating requirements; Waste energy recovery does not include measures such as solar water heating systems which by direct application convert energy for use by consumers, however, such systems could be acquired as a renewable resource under subsection 6(b).

It is expected that in noting proposed conservation measures in his budget submitted to the Congress pursuant to Public Law 93-454, the Administrator shall describe proposals for demonstration projects in sufficient detail to inform Congress as to the type, geographic application and scope of the proposed demonstration projects, in addition to its cost. It is not necessary that every element or customer expected to participate in a proposal be identified.

Section 6(b).—The authorities in this section are in addition to the Administrator's authorities under other acts. The Administrator's authority to acquire electric power on a short term basis pursuant to section 11(b)(i) of Public Law 93-454, and the Administrator's authority to acquire electric power in exchange for transmission or other services are not in any manner intended to be affected by this section. Similarly the replacement of Federal base system resources is also intended to be consistent with the plan, and to satisfy the requirements of section 6, excepting resources acquired from projects authorized by Congress.

Section 6(c).—The Committee intends that the Administrator's decision in part (1) to acquire a major resource will be based upon substantial matter in the rulemaking record.

The Committee adopted alternative procedures in part (3) for the Administrator to follow in certain cases when he determines that he must act in the absence of a plan or when it is determined that a proposed action is inconsistent with the plan. In both cases a specific act of Congress is required before such actions can go forward. To develop a record to assist the Congress in its consideration of such requests, the Committee provided that hearings on the proposed action should be held in accordance with sections 556 and 557 of the Federal Administrative Procedures Act in cases where the proposed action is inconsistent with the plan. In the absence of a plan the Admin-

istrator would be required to develop a record by using a rulemaking type hearing format.

The purpose of part (5) is to provide an opportunity for customers, and particularly small utilities, to acquire appropriate shares of major resources in relation to their load requirements and not be frozen out of ownership, participation, or other sponsorship. The Committee intends that the offer be made in a timely manner and with reasonable terms and conditions, and acceptance or non-acceptance shall be made after a reasonable period for negotiation. This requirement should not be the basis for unreasonable delay in resource acquisition.

This section is referred to in section 9(h) dealing with the Public Utility Holding Company Act, Chapter 2C of Title 15, United States Code.

Section 6(d).—This section authorizes the Administrator to acquire from regional utilities the output of certain experimental, developmental, demonstration or pilot project resources (other than major resources). In the event no utility or political subdivision is willing to construct such a renewable resource at reasonable cost, the Administrator is authorized to construct such resource. The Committee expects that under most circumstances regional utilities or political subdivisions will offer to construct such facilities, and does not intend that this authority be used as the basis for a large construction program or commitment of financial resources by the Administrator. In addition, this research and development should conform to the plan, where areas of research and development are included in the plan.

Section 6(e).—This section requires the Administrator to make maximum practicable use of his customers and local entities in carrying out programs that require arrangements with customers. The Committee does not anticipate that it will be necessary for the Administrator to

deal directly with consumers in implementing conservation measures or acquiring resources. This provision does not give the Administrator any authority to implement mandatory conservation measures through his customers in the absence of the plan which includes mandatory conservation measures and a recommendation by the Council under subsection 4(f).

Section 6(f).—This section provides that the Administrator may enter into agreements which enable him to reimburse the resource sponsor's investigation and pre-construction expenses if, among other circumstances, the resource is subsequently denied State siting approval or other necessary State or Federal permits. The intent of this section is to assure that, through the Administrator's agreement with a resource sponsor, an atmosphere is not created which would prejudice a State siting authority's ability to make an independent decision. Investigation and pre-construction expenses include site investigation and preparation, design and engineering work, and preparation and collection of information to comply with Federal or State laws or regulations. Reimbursable expenses shall not include costs of acquisition of capital equipment or construction materials or construction costs.

This section further provides that the Administrator must terminate his financial commitment, except for certain expenses, after a final denial of an application for State siting approval. It is intended that a final denial include judicial review, if sought, of the denial of State siting approval.

Section 6(g).—Self-explanatory

Section 6(h).—The legislation provides that the Administrator shall grant billing credits to encourage independent conservation measures and development of renewable resources or multipurpose projects by his customers or political subdivisions. The Committee intends that these

credits are to provide an economic incentive for the development of such resources taking into account the risks and benefits accruing to the entity to be credited and the Administrator's other customers. The Committee is concerned that such resources would not otherwise be developed at an early date because it might be economically disadvantageous for a customer or political subdivision to undertake such measures or resources if the alternative is to rely on the Administrator to serve such loads at a melded rate.

The word independent as used in this section is intended to mean conservation activities or resource acquisitions of a customer or political subdivision outside of the region plan without assistance from the Administrator pursuant to this act.

The Committee has provided discretionary authority for the Administrator to grant billing credits to sponsors of any other resources in cases where the granting of such credits is not inconsistent with the plan, the resources for which the credit is granted reduce the obligation of the Administrator to acquire resources under this Act, and only to the extent such credits are cost-effective. It is intended that such credits shall be available only to the extent that power is actually available from the resource for which credits are granted. It is further intended that neither this provision nor the authorities in section 6(a) and (b) should be interpreted to authorize the Administrator to construct transmission facilities except pursuant to the Administrator's authorities under Public Law 93-454 (as amended).

The use of the words "cost-effective" in this section is intended to assure that the impact of such credit upon rates charged by the Administrator under section 7 will not exceed the impact on such rates which would have occurred if the Administrator had acquired an alternative

resource in the absence of the customer's independent conservation or resource activity.

Section 6(i).—The Committee has required the Administrator to exercise oversight over the construction, scheduling, completion, and operation of new resources acquired by the Administrator. This authority is not intended to allow the Administrator to become involved in the activities of corporations or constructing entities except as would be the normal practice under the circumstances and as they relate to the construction and operation of the new resource.

Section 6(j).—This section acknowledges and describes the Administrator's existing practices regarding the purchase and sale of electric power for the account of his utility and direct service industrial customers, and the services the Administrator furnishes to such customers. However, a priority for these services is given for the power from projects under construction on the effective date of this Act if such power was offered for sale to the Administrator at cost plus a reasonable rate of return and such offer was not accepted.

Section 6(k).—Self-explanatory.

Section 6(l).—This section requires that financial assistance, credits, and other benefits are equitably distributed throughout the region. The section is intended to assure that all customers in the region will be equitably treated through the consistent application of criteria of eligibility for such assistance throughout the region.

Section 7(a).—This section restates the Administrator's obligation periodically to establish and modify electric power and transmission rates. These rates shall continue to be established at levels to recover revenues sufficient to pay all of the Administrator's costs. The rates will be effective upon confirmation and approval by the Federal Energy Regulatory Commission. The Committee recognizes that prior to the Department of Energy Organization

Act, the Federal Power Commission exercised interim rate approval authority with respect to the Administrator's rates, and that the Commission presently grants approval, if necessary, on an interim basis pending final approval. Revenues collected under such interim approvals are subject to refund if the rates finally confirmed and approved are lower than the interim rates. This act is not intended to affect the exercise of this authority by the Commission.

Section 7 (b) through (h).—The description and methodology for developing the revenues to be recovered through rates under this section 7 are covered in Appendix B except as noted below. The specific configuration or form of the rates shall be as adopted by the Administrator under subsection 7(a).

At the request of the Committee, the Administrator has prepared an analysis of the rate provisions of the introduced legislation with certain amendments proposed to the Committee, and it is included as Appendix B. This analysis was widely circulated in the region and has become an important part of the common understanding about how the costs of resources would be distributed as a result of this legislation. The Committee takes notice of these understandings and the importance they played in the development of regional expectations for all classes of customers. In full recognition that as a matter of law under this act rates shall be established pursuant to specific statutory provisions in sections 7 and 9 and that the circumstances which were assumed in preparing this analysis will change over time, the Committee has included the computer analysis and accompanying narrative in the appendix.

Section 7(b).—This section establishes a rate or rates for electric power sold to meet the general requirements (defined in this section) of public body cooperative and Federal agency customers and utilities under section 5(b) (2); a rate test to limit the charges that may be recovered by such rates applicable to public body, cooperative and

Federal agency customers after July 1, 1985; and a supplemental rate charge to recover any costs not recovered as a result of the rate test, to be applied through rates to all other power sales of the Administrator which are not limited by the rate test. The supplemental charge in any year should be based on a prospective 5 year average of the amount which the rate without the limit would differ from that as limited by the test rate.

Section 7(c).—Self-explanatory.

Section 7(d)(1).—Self-explanatory.

Section 7(d)(2).—The Administrator is authorized to establish a special rate applicable to an existing direct service industrial customer whose continued operation would otherwise be threatened if: (1) it primarily uses raw materials which are indigenous to the region such as nickel ore, and (2) it accepts a contract similar to its existing modified firm power sales contract with the Administrator which provides that all the customer's power provides reserves to meet firm loads in the region. The Committee is aware of only one direct service customer, Hanna Nickel Mining and Smelting Co., Riddle, Oreg., which would fit the criteria of this section (d)(2). The Committee intends that this provision will apply only to that customer.

Section 7(e).—Self-explanatory.

Section 7(f).—This section specifies rates for firm power sales in the region not covered under subsections 7(b) through 7(d).

Section 7(g).—The costs or benefits under this section 7(g) are intended to be applied in an equitable manner and as appropriate to any or all of the rates for power sales of the Administrator in order to assure that he can meet the requirements of section 7(a) to collect sufficient revenues to recover all of his costs including repayment of the Federal investment in the Federal Columbia River Power System. The excess costs included in this section

(g) for experimental resources under section 6 are those costs for electric power produced in excess of the costs for a matching amount of electric power from resources the Administrator determines that would otherwise have been acquired by the Administrator under section 6.

Section 7(h).—The intent is that rate adjustments for the purposes under section 4(f) shall be superimposed on the rates under section 7(b) through 7(g). The total revenues to be collected by the Administrator through rates, however, would remain the same in accordance with section 7(a), so that rates not subject to such adjustments would be reduced in the aggregate.

Section 8(a).—This section amends the Federal Columbia River Transmission System Act of 1974, Public Law 93-454 (as amended), to permit the Administrator to make payments from the existing Bonneville Power Administration Fund in order to carry out the purposes of this Act. The section does not alter the other purposes for which the Administrator may make such payments under existing law.

Section 8(b).—This section amends Public Law 93-454 (as amended) in four respects. First, it permits the Administrator to use his bond proceeds to implement the authorities granted by this act, including the authority to provide financial assistance for conservation and renewable resources. Second, it specifies that the interest rate for Bonneville bonds shall not exceed the interest rate that would apply to such bonds if they were purchased by the Federal Financing Bank, as are the bonds of certain other federal power marketing or financing agencies. Third, it raises the limit on the amount of Bonneville bonds that may be outstanding at any one time to \$1.75 billion from the level of \$1.25 billion provided in current law. Finally, it adds the Administrator's payments under this act to his payments and expenses under Public Law 93-454 (as amended) in determining the amount to be deducted from the Administrator's gross receipts in the calculation of the Administrator's net proceeds under Public Law 93-454

(as amended); this means that such payments and expenses takes priority over the Administrator's obligation to pay the principal, premiums (if any) and interest on his bonds. The Administrator's ultimate obligation to repay all expenses, including borrowing costs, is not affected.

Section 8(c).—See analysis of section 3(k).

Section 9(a).—This subsection provides the Administrator the same general contracting authority for actions under the act as is provided under section 2(f) of the Bonneville Project Act, Public Law 75-329 (as amended).

Section 9(b).—This section reaffirms the Bonneville Power Administration as a "separate and distinct" organizational entity. The Administrator currently has the capability to carry out all of his personnel, budget and procurement functions and support activities for his major program functions. The Administrator has always exercised independent responsibility over such matters as the administration of his budget, local labor relations, the procurement of legal services, construction contracts, power marketing contracts, claim settlements, selection of technical experts and utilization of local administrative skills.

In order to meet the changing regional needs and to carry out the provisions of this act and the requirements of other statutes, it is necessary that the Administrator continue to be able to carry out his responsibilities in a businesslike and timely manner. The authority and duties of the Administrator under this act will continue to be subject to the supervision and direction of the Secretary. The Committee intends that the Secretary of Energy will, for all of the Administrator's program functions, act by and through the Administrator.

Section 9(c).—This section requires the Administrator to offer long-term (20 year) contracts as provided in this Act to all of his existing public body, cooperative, Federal agency and direct service industrial customers and regional

investor-owned utilities within nine months after enactment of this act. The Committee intends that the Administrator promptly commence negotiating new contracts under this section with each of the authorized parties. It is intended that such contracts contain adequate assurance as to the future power to be supplied to each customer particularly in the event of a regional power planning deficiency. This will facilitate the exchange of existing contracts for new contracts which carry out the allocation of Federal power as provided in this act.

Section 9(d).—This section requires that all electric power sold by the Administrator, including resources acquired under the act, is sold subject to the requirements of Public Law 88-552 (as amended) regarding the priorities for disposition of power. In addition, the Administrator's obligations to meet a customer's firm load requirements will be limited if that customer disposes of a portion of its own resources outside the region and thereby increases its or another regional customer's firm power purchases from the Administrator.

Section 9(e).—This section is intended to identify specific actions of the Administrator under the act as "final actions" under the Administrative Procedures Act for judicial review purposes. Judicial review of a final action related to rates is intended to be based upon substantial evidence in the rulemaking record. Any suit brought to challenge a final action of the Administrator under the act must be brought within 90 days of the final action. Where notice of the final action is published in the Federal Register, the 90 days begins on the date of publication of the notice.

Section 9(f).—This section is intended to allow State and local governmental units (cities, utility districts, joint operating agencies and other governmental units) to continue to finance regional generating resources to meet the loads of such governmental units with the proceeds of "tax

exempt" securities as long as the capability of such resources are primarily purchased by the Administrator to meet the loads of "exempt persons" as defined in section 103(b), title 26 of the United States Code.

Section 9(g).—The Committee expects the Federal Energy Regulatory Commission to make maximum use of the joint State board in reviewing the rates for power sold to the Administrator under sections 5(b)(2) and 6.

Section 9(h).—This section permits the formation and operation of generating subsidiaries by investor-owned utilities in the region primarily for the purpose of developing resources for the Administrator's acquisition and, under numerous safeguards and constraints, grants such subsidiaries a very limited exemption from the Public Utility Holding Company Act. If a revocation of the waiver should occur by either the Administrator or the Securities and Exchange Commission it is intended that the company receiving the revocation be able to reapply for a waiver under this section or under other applicable provisions of the Public Utility Holding Company Act.

The Committee has received an executive communication and an accompanying memorandum from the Securities and Exchange Commission concerning this provision. The materials provided by the Commission have been included in the appendix in an effort to clarify and delineate the policy issues and considerations which the Committee took into account in approving this provision.

Section 9(c) of S. 885 as introduced contained an anti-trust immunity provision and an exemption from the Federal Advisory Committee Act. Those provisions were included for the advisory committees created by S. 885, as introduced, to participate in the planning process. As amended, this act does not establish the committees and, therefore, the provision was stricken.

APPENDIX B.—NUMERICAL ANALYSIS OF RATE DIRECTIVES

PROPOSED PACIFIC NORTHWEST ELECTRIC POWER PLANNING AND CONSERVATION ACT

Analysis of Rate Directives, Including Preference Customer Rate Limit

This analysis is intended to provide a comparison of wholesale power rates to the various regional customers of the Bonneville Power Administration under the proposed legislation. The base data used to complete the analysis reflects current estimates of costs and loads. The impact of these wholesale power costs upon the retail rates charged by BPA customers is not included in this analysis and will vary from customer to customer depending upon many other utility costs. Ultimate rates to the consumer are determined by Public Utility regulatory bodies, Boards, Commissions, or Councils that have jurisdiction over retail rates.

Under the proposed legislation there are three basic rates for power sold by BPA but no particular rate form has been assumed. One rate (Regional Rate) is calculated on the cost of Federal Base System resources and, as needed, IOU exchange power, and future resource additions and will apply to all preference customer and Federal agency loads, exclusive of new large industrial loads, and to investor owned utilities' (IOU's), residential and small irrigation loads up to the first 400 horsepower for any farm. A second rate (New Resource Rate) is applicable to all other utility sales and will be based on costs of resources acquired by BPA under the proposed legislation, and any FBS resources not required by Regional Rate Customers. Finally, after June 1985 the rate applicable to BPA direct service industrial customers (DSI's) will be based upon the retail rates applicable to industry served by BPA preference utility customers.

Particular attention has been given in this analysis to the "preference customer rate limit" which has been proposed as an amendment to section 7(b) of the proposed legislation. The Public Power Council (PPC) advocates this amendment to assure that BPA preference customers' ratepayers will not lose the financial benefits resulting from the preference clause in the Bonneville Act and tax exempt financing of publicly owned facilities if the legislation becomes law. The amendment would require BPA to test the estimated costs under proposed rates to preference customers under the Act against the costs which these customers would have encountered in the absence of legislation. If the estimated costs under BPA rates for any five year period exceed the estimated costs without legislation, the excess costs would be spread over all other rates of the Administrator. The potential effect of this section and its sensitivity to other factors is discussed in section B of this analysis.

Two sets of detailed tables are also included in this analysis. They analyze wholesale cost impacts of the proposed legislation under two current regional load forecasts, the Pacific Northwest Utilities Conference Committee's (PNUCC) regional load forecast and the Northwest Energy Policy Project (NEPP) forecast which could be termed a conservation load forecast. All load growth in the region is assumed to be met by the program. This reflects a maximum impact of sharing but doesn't preclude individual utility action. The tables cover six sample years in the period from 1980-81 to 1994-95. All were prepared by BPA using to the fullest extent practicable currently published data and estimates available from the regional entities with primary responsibility for such data.

Each of the rate directives contained in section 7 of the proposed legislation, including the rate elements of the proposed PPC amendments and the corollary DSI and IOU rate directives, and their application is discussed in section A. Section B discusses specifically the preference

customer rate limit. Basic data used in the analysis listed with explanatory assumptions in section C. Section D provides the "base case" detailed numerical analysis of regional rates under the PNUCC and NEPP forecasts. Lastly, section E summarizes several cases of detailed numerical analyses under varying data assumptions to show the sensitivity of the rate directives to changing conditions.

A. *Basic Rate Directives*—The wholesale power rates to be developed in accordance with these directives will be reviewed and revised as to structure and costs as often as once every year and no less often than once every 5 years. The rate forms (energy, capacity, time differential, conservation, etc.) and levels for each of these rate forms will be determined by the Administrator as presently done through public participation programs in the region and then filed for confirmation and approval with the Federal Energy Regulatory Commission. The overall revenues expected to be collected in accordance with each of these basic sets of rates will correspond to the costs identified in the rate directives.

1. *Regional Rate Exclusive of Preference Rate Limit Proviso (see subsection 7(b) of proposed legislation)*

a. *Rate Availability*—This rate applies to (1) All public body, cooperative and Federal agency customer (including any new preference customer) loads exclusive of new large industrial loads (also excludes any large industrial loads of a new preference customer) and (2) Residential and small irrigation loads (up to the first 400 horsepower for any farm) of the IOU's to the extent the IOU's make exchange power available to BPA at their average system wholesale power costs. The benefits of this rate are required to be passed through to these customers.

b. *Cost Basis*—The rate levels will be set to recover the costs corresponding to the requirements in this rate

group. To the extent power supply is needed the corresponding costs will be included in the following order: (1) Federal Base System resource costs reduced by revenues from the sale of nonfirm attributed to the Federal Base System resources; (2) IOU exchange power at their average system wholesale power costs including reserve costs but reduced by their revenues from sale of their power to entities other than their own consumers including consumers under long term contracts which provide for resale, and excluding the costs related to serving new large industrial loads, new loads outside the region and costs of construction work in progress except to the extent allowed in their respective rates by the regulatory commissions for plants already licensed and sited but in no event any costs associated with a plant that has been terminated; (3) New resources at the New Resources Rate (see section A.3 below) exclusive of any rate adjustments to the new resources rate that would also apply to these rates; (4) Rate adjustments applied to this rate in accordance with section A5 below; (5) Rate adjustments to any particular utility for compliance or noncompliance with conservation standards; and (6) Rate adjustments to the IOU residential and small irrigation customers due to the preference customer rate limit.

c. *Low System Load Density Discounts and Billing Credits*—This general rates or charges to individual systems within this basic rate directive may be adjusted to accommodate discounts for low system density and credits for conservation in addition to the regional efforts or development of individual resources (both are proposed PPC amendments).

2. *Preference Customer Rate Limit Adjustment (PPC amendment)*

a. *Rate Application*—This special adjustment applies to all public body, cooperative, and Federal agency customers of the Administrator projected to receive power

during the particular rate year. It is determined for each year under normal rate proceedings starting with the year 1985-86.

b. Preference Customer Limit Cost Determination

(1) The loads for establishing the resource requirements are (a) Public body, cooperative and Federal agency customer total requirements on the Administrator exclusive of new large industrial loads; and (b) DSI total loads within or adjacent to the service territory of the public bodies and cooperatives. (85 percent of existing DSI's as shown in the attached table)

(2) The cost of resources to meet these requirements are (a) the costs of available Federal Base System resources; (b) Costs of new resources, either actual or hypothetical, constructed or acquired by the public bodies and cooperatives as necessary to meet these preference customer load requirements using the financing costs of such agencies that would have resulted if actions of the Administrator under Section 6 of the Bill were not achieved; plus (c) Any other general system operating costs including reserves, related to service to such customers.

(3) The rate adjustment is established by determining the average difference for the specific rate year and each of the ensuing 4 years by subtracting these rate limit costs from the costs of the Regional Rate determined under section A.1 above exclusive of the A.5.c, A.5.d, A.5.f, and A.1.b(5) adjustments. The preference customer rate limit adjustment is the average of the differences over the 5 years.

(4) If such average difference is positive, it will reduce the revenues to be recovered under the regional rate from the public body, cooperative, and Federal agency customers in a given rate period. The adjustments that were previously applied under A.5.c, A.5.d, A.5.f, and A.1.b(5) are then applied back to the rates for the general require-

ments of these customers. The balance of the revenues not recovered due to the rate limit adjustment is then spread to rates for all other BPA power sold, including nonfirm.

3. *Direct-Service Industry (see proposed amendment)*

a. *Rate Availability.* This rate applies to all "Industrial Firm" sales to BPA's direct-service industries which provide planning and operating reserves. The quantity of power for rate purposes is based on the proportion of the total industrial requirement, on a long-term average (currently estimated to be between 85 percent and 96 percent of the total DSI load), that BPA projects it will be able to serve directly. This projected availability is predicated on the continued planning and development of "firm" resources under critical stream-flow conditions to carry 75 percent of the total DSI requirements. The balance would be served with resources which are in excess of critical planning amounts but operated to meet the entire DSI load as if it were firm. The operation of the System to carry out this purpose results from treating as a firm load the maximum amount of the DSI load (not all of which can be covered under critical streamflow planning), to the extent that this maximum load can be met in the initial period of the PNW Coordination Agreement Critical Period while protecting firm loads against the worst historical streamflow and maintaining an ability to restrict an equivalent amount of the DSI Loads in the later periods (without provisional or advance energy being made available for this amount of the DSI load). Further, in actual operation DSI power withdrawn or curtailed in excess of interruptions for critical streamflows would be replaced by power purchased by BPA on a short-term basis, if available. The projected amounts estimated for the purposes of this analysis recognize the currently projected resource deficits. However, it assumes that by 1985 under the proposed legislation the System would be in load/resource balance.

b. *Cost Basis.* The rate levels are set under different criteria for two separate periods reflecting the time when significant amounts of power currently under contract to the DSI's would become available through expiration of those current contracts.

(1) *1980-81 through 1984-85.* The industrial rates will be set to the levels estimated to be necessary to offset the increased costs to BPA which result from the purchase of IOU exchange power to the extent those costs are not covered through rates applicable for the other classes of power sold by BPA. Generally the costs will be shared during this period with any sales of excess firm, IOU load growth, new large industrial loads of preference customers, and contract demand sales for other special purposes. The rates will be applied to the entire projected availability. This rate is adjusted for the reserve benefits the DSI contracts provide.

(2) *1985-86 and all future.* The rate will be set at a level no less than that set for the year 1984-85 and that is equitable in relation to the retail rates charged by the public body and cooperative customers to their industrial customers. This level is determined by applying a typical margin of cost ("markup" between the preference customers' retail industrial rates and their respective wholesale power costs) to the BPA wholesale rates to the preference customers for all power used to serve their industries. The rate is then adjusted for reserves.

(3) The rates set under paragraphs (1) and (2) above are adjusted to reflect the credits for the value of power system reserves made available to the region's power system through the ability of BPA to interrupt service to the DSI loads. These credits to the DSI rate are then shared as a cost of reserves to all firm power sales, including that portion of the DSI load considered as not providing these reserves (currently 50 percent of the DSI load).

(4) Revenue adjustments will be made to all sales other than the DSI's to cover the difference after 1984-85 between revenues collected from the DSI rate and all other rates and the cost of power required to serve the regional loads.

(5) Rate adjustments applicable in accordance with section A.5 below are reflected directly in the DSI rate through 1984-85 but only indirectly beginning in 1985-86 to the extent they modify the rates from BPA to public bodies and cooperatives for power that serves retail industrial customers.

(6) Rate adjustments to recover revenues not recovered from the public body, cooperative, and Federal agency customers because of the preference customer rate limit and any adjustments for compliance or noncompliance with conservation standards are reflected directly in the DSI rate. At-site discounts apply for the duration of present contracts that contain them.

4. *New Resources Rate (see subsection 7(f) of the proposed legislation)*

a. *Rate Availability.* This rate applies to all other firm sales including but not limited to (1) Investor-owned utility *total* load growth (including residential and small irrigation prior to exchange under subsection 5(b)(2) of the bill) beyond that met with their own resources; (2) New Large Industrial loads served by preference customers; (3) Amounts of additional power needed by Regional Rate loads (section A.1.b(3)) once such loads exceed the capability of the Federal Base System resources and the IOU Exchange Power; and (4) Contract demand type supplies for replacement resources, sales of excess firm or special purpose sales.

b. *Cost Basis.* The rate levels are set to recover the costs of (1) Any balance of Federal Base System resources in excess of the loads served at the Regional

Rate; (2) Any balance of IOU exchange power at average system wholesale power cost (section A.1.b(2)); (3) New resources acquired by the Administrator; (4) Rate adjustments applied to this rate in accordance with section A.5 below; (5) Rate adjustments to any particular utility for compliance or noncompliance with conservation standards; and (6) Rate adjustments to recover revenues not recovered from the public body, cooperative, and Federal agency customers because of the preference customer rate limit (A.2 above).

5. *General Costs* (see subsection 7(g) of the proposed legislation).

The following costs/benefits would also be included as an overall rate adjustment applied to all firm power sales under any rate.

a. Rate adjustment associated with the difference between the revenues from all sales and the cost of resources required for such sales.

b. The cost of reserves associated with firm sales. (Not charged to that portion of the DSI load providing such reserves.)

c. The cost of conservation commensurate with the benefits to those acquiring power under the respective rates.

d. The costs of research and development including pilot project costs to the extent these projects are not cost effective.

e. The revenue benefits from the sale of excess firm and nonfirm—generally allocated in accordance with the resources contributing to such revenues.

f. The costs of uncontrollable events.

g. Rate adjustments for general overhead and from all other costs and benefits as appropriate.

h. The costs of billing credits pursuant to subsection 6(h) of the proposed legislation.

B. Preference Customer Rate Limit—Application and Sensitivities

The preference customer rate limit is intended to assure that the financial benefits of the preference clause in the Bonneville Act will continue to accrue to BPA preference customers. It is based on the assumptions that: (1) ultimately all of BPA's base system resources would be sold to preference customers and Federal agencies, (2) BPA's total DSI load within and adjacent to preference customer service area (currently 85 percent per attached table) would be served by those preference customers, (3) preference customers would construct new generating resources to meet their loads in excess of the Federal Base System Resources using tax exempt bonds and REA/CFC loans to finance such construction, and (4) there would be some fixed and variable cost savings to such customers which would not be available without the regional purchase program envisaged under the proposed legislation.

Additionally the rate limit assures preference agencies their consumers' rates will not be affected if, in the future, IOU new resource costs are higher than anticipated, either through higher financing, construction, or operating costs. In turn, the resource costs of the IOU's will continue to be the concern of the state PUC's. If IOU costs are high compared to preference customers the IOU residential customers, as well as the IOU commercial and industrial rates will be directly affected.

The specific rate limit factors are objective in nature. The first, the size and cost of the Federal Base System Resources, will be determinable in much the same way that BPA applies in its current power marketing operations and ratemaking. The size and location of DSI loads with respect to preference customer service areas are also easily identified. The amount of new resources needed to meet preference customer load growth, including the applicable DSI load, and its cost may require some minor esti-

rating. This is principally because preference customer resource construction probably will never exactly match preference customer load growth (high or low). The monetary benefits which would not be available to preference customers without the program will be the hardest to determine. This analysis limits its consideration to two specific areas: lower financing costs and lower system planning and operating reserve costs. Consideration of other savings may be appropriate if they can be stated and quantified in an objective manner and they are not recognized in A.5. All these items will be fully reviewed in the normal rate setting process.

BPA has run several sensitivity analyses of the proposed limit to determine how it may be a factor in the rates. Case studies were made to determine the general effect of variations in load growth, various increases in cost of resources, new preference customers, lower DSI loads, increased inflation costs, and varied cost of exchange power. As might be anticipated, if the IOU annual costs for new resource developments are substantially higher than those of preference customers due to higher interest rates, lower than anticipated tax benefits and higher than expected capital costs, then the rate limit triggers in the later years of the analysis, after 1994-95. This impact seems reasonable since (1) Congress has granted tax exemption to public bodies and it makes sense if this financing benefit actually causes a substantial difference in program resource costs between public and IOU financed resources that the benefits should flow back to preference agencies, (2) the incentive to obtain tax benefits and apply them to annual resource costs will be clearly placed on IOU participants in the program, (3) the efficiency of the IOU's design and construction and the cost and feasibility of proposed resources becomes not only in the interest of the IOU's but the state regulatory bodies responsible for approving IOU rates. The rate limit would reinstate the yardstick principle which has traditionally been used to

support the multiple kind of utility ownership which exists in the Pacific Northwest today. Other areas which appear to cause the rate limit to apply are slower preference customer load growth than IOU load growth, lower DSI loads, and increased IOU exchange power costs.

C. Assumptions Used in Development of the Base Data for Numerical Analysis

Resources

1. Federal Base System. These amounts are estimates of the total Federal hydro and net-billed thermal expected to be available for sale under the program. Associated costs of Federal Base System power shown are derived by estimating the cost of transmitting Federal power on the BPA grid, the cost of generating Federal power from hydroelectric projects, and the cost of operating the net-billed thermal plants. The following schedule of future wholesale power rate increases was used to determine cost levels through 1986:

| Rate Adjustment Date | 1st Year of Study Affected | Effective Percentage Increase Over Present Level |
|----------------------------|----------------------------------|---|
| December 1979 | 1980-81 | 90 |
| July 1981 | 1981-82 | 99 |
| July 1982 | 1982-83 | 122 |
| July 1983 | 1983-84 | 132 |
| July 1985 | 1985-86 | 134 |

The costs of these resources are spread over total estimated Federal energy resources including secondary resources in arriving at the expected sales rate.

2. IOU Base System. These amounts are the IOU system resources planned to be in service by 1983. Prior to 1983, the level of resource was set equal to the IOU total system load. The rates associated with these resources are estimates of the average delivered cost, in the

year shown, of all private utility resources expected to be operating by 1983.

3. PA Base System. Estimates of public agencies' own system resource dedicated to their loads as of July 1, 1976.

4. Incremental New Resource Costs. The incremental cost of new resources for each sample year was established for effective interest costs on the capital portions at 7.0, 7.25, 7.50 and 9.0 percent all at 100 percent debt financing. The effective interest costs were derived from a Lehman Bros., Kuhn Loeb study dated November 1978. The public agency financing costs with the regional backup (not Federal guarantee) were estimated at 7.00 percent; without regional backup, but all public agency and cooperative backup, at 7.25 percent. The IOU financing cost at 100 percent debt with regional backup was estimated at 9.00 percent.

The 7.50 percent effective interest rate for IOU new resources in the base case was determined by 100 percent debt at 9.0 percent interest less $\frac{1}{3}$ of the possible investment tax credits and rapid depreciation allowances assuming a 46 percent tax rate. A similar result obtains from 90 percent debt at 9.0 percent interest (could include preferred stock) and 10 percent equity at 18.25 percent interest with $\frac{1}{2}$ of the available tax benefits. No credit was given for lower capital costs resulting from possible IOU advantages in construction. The capital and O&M costs exclusive of financing is estimated here to be the same for both public and IOU plants.

The incremental costs of new resources were based on known, conventional thermal. These costs were also considered to be reasonably representative of renewable resource costs. Estimates of incremental costs for a typical nuclear plant, a typical mine-mouth coal plant, and a typical coal plant located at load center were made for each of the interest rate levels for each of the three years 1985,

1990 and 1995. The resulting incremental costs for each year were determined by weighting the costs of the three types of plant—50 percent nuclear, $33\frac{1}{3}$ percent coal-fired (mine-mouth) and $16\frac{2}{3}$ percent coal-fired (load center).

The average new resource costs which appear in the study cases are calculated by bringing on resources in the initial year they are needed at the incremental cost of new resources in that year. One-third of the incremental cost is assumed to be O&M including fuel expense. The O&M portion is escalated at 7 percent annually from the year the resource is brought on. Therefore the average cost of new resources in any year is a weighted average of already installed new resources with O&M escalated at 7 percent up to the given year and any additional new resources needed costed at the incremental cost of new resources for that year. The public costs were assumed for preference customer load growth and the IOU costs for IOU growth. The DSI growth was assumed to be met by public and IOU plants in proportion to their respective growth rates, and to include the full amount of all conditional allowances for technological improvement processes (not plant expansion).

5. Reserves.

a. The value of reserves provided by the right to interrupt the DSI load was calculated for each year in the following manner (no attempt was made to treat energy and capacity reserves separately):

1. The average megawatts of regional reserves being provided are normally considered to be one-half the DSI load. A more precise estimate is determined by taking one quartile of the DSI load plus whatever portion of the top quartile is assumed to be available in the given year.

2. The average cost of each megawatt of reserves is estimated by determining the capital costs (no O&M) associated with all of the 'new resources' that are

in place in the given year and the total Federal Base System costs in that year.

3. Applying the resultant average cost to the amount of reserves provided yields the total number of dollars associated with these reserves. The method described here does not establish the only way to evaluate the value of the reserves, but instead is an attempt to arrive at a reasonable estimate for purposes of this numerical analysis.

b. The amount of reserves applied to the preference customer rate limit computation is determined by:

1. reducing the average cost of each megawatt of reserves by the ratio of the total rate limit load to the total program resources;

2. reducing the megawatts of reserves provided by the DSIs by the percent DSIs within or adjacent to preference customers (85 percent assumed);

3. applying the average cost to the number of reserve megawatts.

c. The amount of Reserve Adjustment credited to the DSIs under this study of the program is equal to one-half of the total value of the reserves. Thus approximately one-half of the savings to the region, in not building standby generation reserves, was credited to the DSIs for providing these reserves, and the remaining one-half was shared among the region's firm loads including 50 percent of the DSI load. The crediting of 50 percent of the value of the reserves to the DSIs does not set a precedent for future BPA rate cases. The form of availability credit or other reserve credit mechanism to be applied is not meant to be specified or prejudiced by the assumptions that are here.

Loads

PNUCC Loads

6. IOU. Forecasts for both the domestic and rural loads as well as the commercial and industrial loads were

provided by representatives of the IOUs. Loads shown are for both east group and west group utilities. West group forecasts are consistent with loads appearing in the 1979 Bluebook.

7. PA. Total load forecasts are taken from the 1978 Bluebook. Net requirements on BPA are derived by netting the PA base system resources from their total load.

8. FA. Forecasts taken from 1978 Bluebook.

9. DSI. Forecasts taken from 1978 Bluebook, and based on DSI contract entitlement, assuming full qualification for technological improvement allowances. The load of the Alumax plant is not included here prior to 1983.

10. The Federal agency customer and DSI load forecasts under both the PNUCC and NEPP forecasts were considered to be the same since they are principally a contract load.

NEPP Loads

11. IOU. Forecasts for domestic and rural loads were made by applying a 3.90 percent growth rate per year to the PNUCC 1979-80 load of 3451 megawatts. For the loads of the commercial and industrial customers, a composite growth rate of 2.53 percent was applied to the PNUCC 1979-80 load of 4537 megawatts.

12. PA. By a cursory evaluation of some typical utility systems, the domestic and rural or residential component of load was found to approximate 40 percent of the utility class total load. Therefore, we assumed that 40 percent of the public agency PNUCC 1979-80 load was domestic and rural, and the remaining 60 percent was commercial and industrial. NEPP forecasts were derived by applying a 3.90 percent growth rate per year to the domestic and rural base load for 1979-80 of 2742 megawatts and a 2.53 percent growth rate per year to the commercial and industrial base load of 4112 megawatts.

BASE DATA

| | 1980-81 | | 1982-83 | | 1984-85 | | 1985-86 | | 1989-90 | | 1994-95 | |
|--|---------|-------|---------|-------|---------|-------|---------|-------|---------|-------|---------|-------|
| | MW | m/kWh | MW | m/kWh | MW | m/kWh | MW | m/kWh | MW | m/kWh | MW | m/kWh |
| RESOURCES | | | | | | | | | | | | |
| Federal base system..... | 8,199 | 8.5 | 8,740 | 7.6 | 8,750 | 7.9 | 9,870 | 8.0 | 9,520 | 8.7 | 9,470 | 10.0 |
| Secondary..... | 1,660 | | 1,780 | | 1,780 | | 1,780 | | 1,780 | | 1,780 | |
| IOU base system..... | 8,404 | 16.2 | 9,176 | 18.0 | 9,176 | 20.3 | 9,176 | 20.9 | 9,176 | 23.1 | 9,176 | 26.3 |
| PA base system..... | 2,520 | | 2,340 | | 2,360 | | 2,362 | | 2,370 | | 2,390 | |
| Incremental new resource costs (100 percent debt): | | | | | | | | | | | | |
| 7 percent..... | | 21.5 | | 25.1 | | 28.7 | | 30.5 | | 37.7 | | 48.3 |
| 7.25 percent..... | | 23.2 | | 25.9 | | 29.0 | | 30.7 | | 38.3 | | 49.2 |
| 7.50 percent..... | | 23.9 | | 26.6 | | 29.7 | | 31.3 | | 38.8 | | 49.7 |
| 9 percent..... | | 26.4 | | 29.5 | | 32.0 | | 34.9 | | 43.7 | | 54.3 |
| Value of regional reserves (millions)..... | \$59.8 | | \$85.0 | | \$112.2 | | \$157.8 | | \$242.0 | | \$360.0 | |
| Reserves supplied by PA under rate ceiling (millions)..... | | | | | | | \$124.8 | | \$168.0 | | \$272.0 | |
| Reserve adjustment credit to IOU's under program (millions)..... | \$29.9 | | \$42.5 | | \$56.8 | | \$78.9 | | \$121.0 | | \$180.0 | |
| LOADS | | | | | | | | | | | | |
| PRUCE loads: | | | | | | | | | | | | |
| IOU D + R..... | 3,736 | | 4,072 | | 4,415 | | 4,598 | | 5,375 | | 6,421 | |
| IOU C + I..... | 4,468 | | 5,104 | | 5,547 | | 5,798 | | 6,933 | | 8,681 | |
| IOU total..... | 8,404 | | 9,176 | | 9,962 | | 10,396 | | 12,308 | | 15,102 | |
| PA total..... | 7,171 | | 7,659 | | 7,172 | | 8,624 | | 10,145 | | 12,319 | |
| PA net requirements..... | 4,851 | | 5,319 | | 5,912 | | 6,262 | | 7,775 | | 9,929 | |
| PA total..... | 221 | | 259 | | 275 | | 284 | | 305 | | 326 | |
| DSI, 75 percent..... | 2,618 | | 3,049 | | 3,108 | | 3,137 | | 3,256 | | 3,405 | |
| DSI, 25 percent..... | 1,072 | | 1,065 | | 1,085 | | 1,095 | | 1,135 | | 1,184 | |
| DSI total..... | 3,691 | | 4,114 | | 4,193 | | 4,232 | | 4,391 | | 4,589 | |
| NEPP loads: | | | | | | | | | | | | |
| IOU D + R..... | 3,700 | | 3,986 | | 4,316 | | 4,485 | | 5,130 | | 6,239 | |
| IOU D + I..... | 4,538 | | 4,765 | | 5,004 | | 5,128 | | 5,755 | | 6,388 | |
| IOU total..... | 8,238 | | 8,751 | | 9,320 | | 9,613 | | 10,885 | | 12,727 | |
| PA total..... | 7,065 | | 7,588 | | 7,879 | | 8,227 | | 9,299 | | 10,950 | |
| PA net requirements..... | 4,745 | | 5,168 | | 5,619 | | 5,985 | | 6,929 | | 8,480 | |

DSI CUSTOMERS

| | Megawatts ¹ | Percent of BPA total DSI megawatts |
|---|------------------------|--|
| I. Within BPA preference customers' service areas: | | |
| Alcoa—Vancouver..... | 238.5 | 7.2 |
| Alcoa—Wenatchee..... | 213.1 | 6.4 |
| Kaiser—Tacoma..... | 152.0 | 4.6 |
| Martin-Marietta—The Dalles..... | 188.0 | 5.1 |
| Martin-Marietta—Goldendale..... | 210.9 | 6.4 |
| Raynolds—Longview..... | 414.0 | 12.5 |
| Carborundum—Vancouver..... | 28.1 | .9 |
| Subtotal..... | 1,424.6 | 43.1 |
| II. Adjacent to BPA preference customers' service areas: | | |
| Anaconda—Columbia Falls..... | 337.8 | 10.2 |
| Kaiser—Spokane..... | 448.6 | 13.6 |
| Kaiser—Trentwood..... | 62.1 | 1.9 |
| Stauffer—Silver Bow..... | 51.3 | 1.8 |
| Georgia Pacific—Bellingham..... | 20.3 | .6 |
| Oremet—Albany..... | 3.4 | .1 |
| Intalco—Ferndale..... | 422.4 | 12.8 |
| Subtotal..... | 1,356.9 | 41.0 |
| III. Could not readily be served by BPA preference customers: | | |
| Crown Zellerbach—Port Townsend..... | 13.2 | .4 |
| Hanna Nickel—Riddle..... | 114.0 | 3.4 |
| Pacific Carbide..... | 9.0 | .3 |
| Penwalt..... | 45.7 | 1.4 |
| Raynolds—Troutdale..... | 271.6 | 8.2 |
| Union Carbide..... | 20.3 | .6 |
| Alcoa—Addy..... | 53.2 | 1.6 |
| Subtotal..... | 527.0 | 15.9 |
| Total..... | 3,308.5 | 100.2 |

¹ Industrial firm contract demand as of Mar. 29, 1978.

D. Regional Program Study Cases

Footnotes to Regional Program Study Case

| | |
|--------------|--|
| Line No. | |
| 2, 5, 6..... | "PNUCC Base Case" from 1978 PNUCC West Group Forecast. "NEPP Base Case from Northwest Energy Policy Project 1978 median load estimate. |
| 3..... | Own Resources dedicated to preference customer loads as of July 1, 1978. |
| 8, 9..... | "PNUCC Base Case" from 1979 PNUCC West Group Forecast and the East Group Forecast. "NEPP Base Case" from Northwest Energy Policy Project 1978 median loan estimate. |
| 7..... | Own resources from PNUCC West Group and the East Group Forecast limited to July 1, 1983, resource amounts. |
| 10-12..... | From 1978 PNUCC West Group Forecast. |
| 14..... | The sum of lines 4, 5, 8, and 12. |
| 15..... | The sum of lines 4, 5, 8, and 10. |
| 16-26..... | Preference customer rate limit calculation. For purposes of this analysis this is only a single year calculation. The averages of the cost differences over a five year period are not reflected here. |
| 18..... | Rate estimated on average kilowatt hour cost based upon sale of all Federal hydro and net-billed resource energy including median year nonfirm energy. |

- 19 ----- Assumes PA 100 percent debt financed 7.25 percent interest cost. O&M costs for generating resources estimated to escalate at 7 percent annum. Capital Costs Assumption No. 4 in Base Data.
- 20 ----- See Base Data Assumption No. 5.
- 25 ----- 85 percent of DSI Industrial Firm power contract demand.
- 27-40 ----- Breakdown of Regional Rate directive components.
- 31, 45 ----- Blended PA and IOU resource cost. See Base Data Assumption No. 4.
- 32, 52 ----- Adjustment for difference between anticipated revenues from all rates and the net cost of resources.
- 33, 49, 51 ----- Adjustment for cost of reserves furnished by DSI loads. Spread among all utility firm loads and 50 percent of DSI load.
- 38 ----- Preference customer rate limit credit (if any) is applied here.
- 39, 53, 65 ----- Increase of other rates for preference customer rate limit (if any) is applied here.
- 41-56 ----- Breakdown of New Resource Rate components.
- 57-60 ----- Breakdown of IOU Exchange Rate components. See Base Data Assumption No. 4.
- 61-68 ----- Breakdown of DSI Rate components.
- 62 ----- Prior to July 1, 1985, the DSI rate is set to recover the net costs of the IOU exchange not covered by other rates. For the purpose of this study the costs allocated to supplying the DSI load are an average rate which, if broken down, would be equivalent to 75 percent of DSI load served at the New Resource Rate and 55 percent of the top quartile served from Federal Base System secondary power. All costs are then spread over the total power projected to be made available to the DSI's.

After July 1, 1985, the DSI rate for this case is assumed to be 133 percent of the applicable wholesale power costs from BPA to preference customers. No attempt is made here to carry out the cost of service adjustments of proposed section 7(c)1. This cost was estimated by assuming industrial sales will represent 25 percent of preference customer loads in 1983. Thereafter 10 percent of preference customer load growth is assumed to be large new industrial load served at the New Resources Rate. The remaining 15 percent of industrial load growth and the pre-1983 industrial load was served at the regional rate. No specific size for large new industrial loads was assumed. An attempt is made to reflect projected total industrial load growth, and not the precise split between large and new industrial loads and the remaining industrial load growth. For statistical purposes under this study, the DSI rate is then constructed on a weighted average of the Regional Rate and the New Resources Rate using the above assumptions.

- 63 ----- Rate credit to DSI rate for value of reserves furnished by DSI loads. (See Base Data Assumption No. 5).
- 67 ----- Estimated at 125 percent of new resources cost.
- 72 ----- Until July 1, 1985, the costs shown represent a blend of BPA Regional Rate costs and IOU average resource costs. (50/50 in 1980-81 to 100 percent BPA Regional Rate beginning July 1, 1985, and thereafter).

E. Sensitivity Analysis Cases

A sensitivity analysis of the rates under varying load and resource cost conditions is necessary to evaluate the stability of the rate directives in relation to each other. It is also important to avoid a reliance

on the absolute amounts of the rate computations. The sensitivity variations hopefully provide a reasonable range of values and risks within which to evaluate the rate directive consequences.

Each of the variations listed below keep all assumptions the same except for the one identified. Each variation is then evaluated under both the PNUCC and the NEPP (conservation) load forecasts. Only the summaries of each analysis is listed.

| Case No. | Variation |
|-------------|---|
| 1, 2----- | Base case. |
| 3, 4----- | The IOU incremental new resource costs are set equal to the preference customer new resource costs. |
| 5, 6----- | Incremental new resource costs for both preference customer and IOU new resources are increased by 5 percent in 1984-85, by 6 percent in 1985-86, by 10 percent in 1989-90, and by 15 percent in 1994-95. |
| 7, 8----- | A new preference customer is formed beginning in 1984-85 out of the IOU loads equal to 5 percent of the preference customer load. |
| 9, 10----- | The Federal Base System rates are set assuming WPPSS financing of IDC for the Net Billed projects (39 percent rate increase in 1980-81). |
| 11, 12----- | Beginning in 1984 the IOU exchange rate increases, reaching a level of 5 percent higher than in the base case in the year 1989-90. A 5 percent increase is used for 1994-95 as well. |
| 13, 14----- | The DSI load is reduced by 10 percent beginning in 1982-83. This could approximate the DSI load without Alumax. |
| 15, 16----- | The IOU new resource costs are assumed without the tax benefits (accelerated depreciation and investment tax credits). |
| 17, 18----- | The markup applied to the typical public agency industrial customer average cost to determine the DSI rate is assumed to be 25 percent rather than 33 percent. |

REGIONAL PROGRAM STUDY CASE

| Line | | 1980-81 | | 1982-83 | | 1984-85 | | 1985-86 | | 1989-90 | | 1994-95 | |
|--|--|---------|-------|---------|-------|---------|-------|---------|-------|---------|-------|---------|-------|
| | | MW | M/AWh | MW | M/AWh | MW | M/AWh | MW | M/AWh | MW | M/AWh | MW | M/AWh |
| PNUCC BASE CASE—90 PERCENT RATE INCREASE, PNUCC LOADS, CASE I | | | | | | | | | | | | | |
| 1 | Regional loads: | | | | | | | | | | | | |
| 2 | Preference customers total | 7,171 | | 7,659 | | 8,272 | | 8,624 | | 10,145 | | 12,319 | |
| 3 | Own resources | 2,370 | | 2,340 | | 2,360 | | 2,362 | | 2,370 | | 2,390 | |
| 4 | Net requirements | 4,851 | | 5,319 | | 5,912 | | 6,262 | | 7,775 | | 9,929 | |
| 5 | Federal agencies | 221 | | 259 | | 275 | | 284 | | 305 | | 326 | |
| 6 | IOU total | 8,404 | | 9,176 | | 9,982 | | 10,396 | | 12,300 | | 15,022 | |
| 7 | Own resources | 8,404 | | 9,176 | | 9,176 | | 9,176 | | 9,176 | | 9,176 | |
| 8 | Net requirements | 0 | | 0 | | 806 | | 1,220 | | 3,132 | | 5,846 | |
| 9 | IOU resources and family farm irrigation | 3,736 | | 4,072 | | 4,415 | | 4,593 | | 5,375 | | 6,421 | |
| 10 | DSI: | | | | | | | | | | | | |
| 11 | 75 percent | 2,618 | | 3,019 | | 3,108 | | 3,137 | | 3,256 | | 3,405 | |
| | 25 percent | 1,073 | | 1,065 | | 1,085 | | 1,095 | | 1,135 | | 1,184 | |
| 12 | Total | 3,691 | | 4,114 | | 4,193 | | 4,232 | | 4,391 | | 4,589 | |
| 13 | Net requirements on BPA: | | | | | | | | | | | | |
| 14 | Total | 7,763 | | 9,692 | | 11,186 | | 11,998 | | 15,603 | | 20,690 | |
| 15 | Without DSI 25 percent | 7,690 | | 8,627 | | 10,001 | | 10,903 | | 14,468 | | 19,506 | |
| 16 | Preference customer rate limit | | | | | | | | | | | | |
| 17 | resources: | | | | | | | | | | | | |
| 18 | Federal base system | 8,190 | | 8,740 | | 9,750 | | 9,476 | 8.0 | 9,436 | 8.7 | 9,470 | 12.2 |
| 19 | Additional resources | 19 | | 335 | | 1 | | 667 | 29.8 | 2,376 | 35.6 | 4,686 | 43.9 |
| 20 | Reserve costs | | | | | | | | 1.4 | | 1.6 | | 1.8 |
| 21 | Total | 8,209 | | 9,075 | | 9,751 | | 10,143 | 10.8 | 11,812 | 15.7 | 14,156 | 23.0 |
| 22 | Loads: | | | | | | | | | | | | |
| 23 | Preference customer net requirements | 4,851 | | 5,319 | | 5,912 | | 6,262 | | 7,775 | | 9,929 | |
| 24 | Federal agencies | 221 | | 259 | | 275 | | 284 | | 305 | | 326 | |
| 25 | 35 percent DSI | 3,137 | | 3,497 | | 3,564 | | 3,597 | | 3,732 | | 3,901 | |
| 26 | Total | 8,209 | | 9,075 | | 9,751 | | 10,143 | | 11,812 | | 14,156 | |

REGIONAL PROGRAM STUDY CASE—Continued

| Line | | 1980-81 | | 1982-83 | | 1984-85 | | 1985-86 | | 1989-90 | | 1994-95 | |
|------|----------------------------------|---------|-------|---------|-------|---------|-------|---------|-------|---------|-------|---------|-------|
| | | MW | M/kWh | MW | M/kWh | MW | M/kWh | MW | M/kWh | MW | M/kWh | MW | M/kWh |
| 27 | Regional rate resources: | | | | | | | | | | | | |
| 28 | Federal base system | 6,940 | 6.5 | 8,428 | 7.6 | 9,750 | 7.9 | 9,879 | 8.0 | 9,520 | 8.7 | 9,470 | 10.0 |
| 30 | IOU exchange | 0 | | 0 | | 411 | 20.4 | 1,274 | 21.3 | 3,935 | 26.3 | 6,421 | 33.7 |
| 31 | New resources | 0 | | 0 | | 0 | | 0 | | 0 | | 785 | 44.2 |
| 32 | Revenue adjustment | | | | | | | | .4 | | 1.1 | | .4 |
| 33 | Reserve adjustment | | .4 | | .5 | | .5 | | .6 | | .7 | | .8 |
| 34 | Total | 6,940 | 6.9 | 8,428 | 8.1 | 10,161 | 8.9 | 11,144 | 10.5 | 13,455 | 15.7 | 16,676 | 22.0 |
| 35 | Loads: | | | | | | | | | | | | |
| 36 | Preference rate credits | | | | | | | | | | | | |
| 37 | Preference customers | 4,851 | 6.9 | 5,319 | 8.1 | 5,912 | 8.9 | 6,262 | 10.5 | 7,775 | 15.7 | 9,929 | 22.0 |
| 38 | Federal agencies | 221 | 6.9 | 259 | 8.1 | 275 | 8.9 | 284 | 10.5 | 305 | 15.7 | 326 | 22.0 |
| 39 | Preference rate adjustment | | | | | | | | | | | | |
| 40 | IOU (residential and irrigation) | 1,868 | 6.9 | 2,850 | 8.1 | 3,974 | 8.9 | 4,598 | 10.5 | 5,375 | 15.7 | 6,421 | 22.0 |
| 41 | New resources rate: | | | | | | | | | | | | |
| 42 | Resources: | | | | | | | | | | | | |
| 43 | Federal base system | 1,250 | 6.5 | 312 | 7.6 | 0 | | 0 | | 0 | | 0 | |
| 44 | IOU exchange | 1,868 | 16.2 | 2,850 | 18.0 | 3,563 | 20.4 | 3,324 | 21.3 | 1,440 | 26.3 | 0 | |
| 45 | New resources | 0 | 22.5 | 0 | 25.6 | 351 | 28.8 | 1,033 | 30.4 | 4,949 | 38.1 | 10,036 | 44.2 |
| 46 | Total | 3,118 | 12.3 | 3,162 | 17.0 | 3,914 | 21.2 | 4,357 | 23.5 | 6,389 | 33.9 | 10,036 | 44.2 |
| 47 | Loads: | | | | | | | | | | | | |
| 48 | Regional rate | 0 | | 0 | | 0 | | 0 | | 0 | | 785 | 44.2 |
| 49 | Reserve adjustment | | .3 | | .3 | | .3 | | .4 | | .5 | | .6 |
| 50 | DSI 75 percent | 2,618 | 12.6 | 3,049 | 17.3 | 3,100 | 21.5 | 3,137 | 23.9 | 3,256 | 34.4 | 3,405 | 44.7 |
| 51 | Reserve adjustment | | .4 | | .5 | | .5 | | .6 | | .7 | | .8 |
| 52 | Revenue adjustment | | | | | | | | .4 | | 1.1 | | .4 |
| 53 | Preference rate adjustment | | | | | | | | | | | | |
| 54 | IOU load growth | 0 | | 0 | | 806 | 21.7 | 1,220 | 24.5 | 3,132 | 35.0 | 5,846 | 45.4 |
| 55 | Excess resources | 500 | 12.7 | 113 | 17.4 | 0 | | 0 | | 0 | | 0 | |
| 56 | Total | 3,118 | | 3,162 | | 3,914 | | 4,357 | | 6,389 | | 10,036 | |
| 57 | IOU exchange rate: | | | | | | | | | | | | |
| 58 | Base resources | 8,404 | 16.2 | 9,176 | 18.0 | 9,176 | 20.3 | 9,176 | 20.9 | 9,136 | 23.1 | 9,176 | 26.3 |
| 59 | New resources rate | 0 | | 0 | | 806 | 21.7 | 1,220 | 24.5 | 3,132 | 35.0 | 5,846 | 45.4 |
| 60 | Total | 8,404 | 16.2 | 9,176 | 18.0 | 9,982 | 20.4 | 10,396 | 21.3 | 12,268 | 26.3 | 15,022 | 33.7 |
| 61 | DSI: | | | | | | | | | | | | |
| 62 | Loads: | 3,200 | 11.5 | 3,635 | 15.7 | 3,706 | 18.3 | 3,960 | 19.3 | 4,187 | 24.2 | 4,293 | 30.1 |
| 63 | Reserve credit | | -1.1 | | -1.3 | | -1.7 | | -2.2 | | -3.4 | | -4.5 |
| 64 | Reserve adjustment | | .2 | | .2 | | .2 | | .3 | | .4 | | .4 |
| 65 | Preference rate adjustment | | | | | | | | | | | | |

| | | | | | | | | | | | | | |
|----|-----------------------------------|-------|------|-------|------|-------|------|--------|------|--------|------|--------|------|
| 66 | Net | 3,208 | 10.6 | 3,635 | 14.6 | 3,705 | 17.8 | 3,958 | 17.3 | 4,107 | 21.2 | 4,293 | 36.7 |
| 67 | IRE | 483 | 28.1 | 479 | 32.1 | 488 | 38.0 | 274 | 36.0 | 284 | 45.2 | 296 | 55.2 |
| 68 | Composite | 3,691 | 12.9 | 4,114 | 16.6 | 4,193 | 19.9 | 4,232 | 18.7 | 4,391 | 22.6 | 4,589 | 32.3 |
| 69 | Summary: | | | | | | | | | | | | |
| 70 | Preference customers from program | 4,851 | 6.9 | 5,319 | 8.1 | 5,917 | 8.9 | 6,267 | 10.5 | 7,775 | 15.7 | 9,929 | 22.0 |
| 71 | Federal agency customers | 221 | 6.9 | 259 | 8.1 | 275 | 8.9 | 234 | 10.5 | 305 | 15.7 | 326 | 22.0 |
| 72 | IOU (residential and irrigation) | 3,736 | 11.5 | 4,072 | 11.0 | 4,415 | 10.0 | 4,598 | 10.5 | 5,375 | 15.7 | 6,421 | 22.0 |
| 73 | IOU (commercial and industrial) | 4,668 | 16.2 | 5,104 | 18.0 | 5,567 | 20.4 | 5,793 | 21.3 | 6,933 | 26.3 | 8,901 | 33.7 |
| 74 | IOU composite | 8,404 | 14.1 | 9,178 | 14.9 | 9,982 | 15.8 | 10,396 | 16.5 | 12,308 | 21.7 | 15,822 | 28.7 |

NEPP BASE CASE—90 PERCENT RATE INCREASE,
NEPP LOADS, CASE 2

| | | | | | | | | | | | | | |
|----|--|-------|--|-------|--|--------|--|--------|--|--------|--|--------|--|
| 1 | Regional loads: | | | | | | | | | | | | |
| 2 | Preference customers total | 7,065 | | 7,508 | | 7,979 | | 8,227 | | 9,299 | | 10,870 | |
| 3 | Own resources | 2,320 | | 2,340 | | 2,360 | | 2,367 | | 2,370 | | 2,390 | |
| 4 | Net requirements | 4,745 | | 5,168 | | 5,619 | | 7,865 | | 6,929 | | 8,480 | |
| 5 | Federal agencies | 221 | | 259 | | 275 | | 284 | | 305 | | 326 | |
| 6 | IOU total | 8,238 | | 8,761 | | 9,320 | | 9,613 | | 10,885 | | 12,727 | |
| 7 | Own resources | 8,404 | | 9,178 | | 9,176 | | 9,176 | | 9,176 | | 9,176 | |
| 8 | Net requirements | 0 | | 0 | | 144 | | 437 | | 1,709 | | 3,551 | |
| 9 | IOU residential and family farm irrigation | 3,708 | | 3,996 | | 4,316 | | 4,485 | | 5,130 | | 6,339 | |
| 10 | DSI | | | | | | | | | | | | |
| 11 | 75 percent | 2,618 | | 3,049 | | 3,108 | | 3,137 | | 3,256 | | 3,405 | |
| 12 | 25 percent | 1,073 | | 1,065 | | 1,085 | | 1,095 | | 1,135 | | 1,184 | |
| 13 | Total | 3,691 | | 4,114 | | 4,193 | | 4,232 | | 4,391 | | 4,589 | |
| 14 | Net requirements on BPA: | | | | | | | | | | | | |
| 15 | Total | 8,457 | | 9,541 | | 10,231 | | 10,818 | | 13,334 | | 16,926 | |
| 16 | Without DSI 25 percent | 7,584 | | 8,476 | | 9,146 | | 9,723 | | 12,199 | | 15,742 | |
| 17 | Preference customer rate limit resources: | | | | | | | | | | | | |
| 18 | Federal base system | 8,103 | | 8,740 | | 9,458 | | 9,476 | | 9,436 | | 9,470 | |
| 19 | Additional resources | 0 | | 184 | | 0 | | 270 | | 29.5 | | 3,217 | |
| 20 | Reserve costs | | | | | | | | | 1.6 | | 1.9 | |
| 21 | Total | 8,103 | | 8,924 | | 9,458 | | 9,746 | | 10,2 | | 12,687 | |
| 22 | Loans: | | | | | | | | | | | | |
| 23 | Preference customer net requirements | 4,745 | | 5,168 | | 5,619 | | 7,865 | | 6,929 | | 8,480 | |
| 24 | Federal agencies | 221 | | 259 | | 275 | | 284 | | 305 | | 326 | |
| 25 | 85 percent DSI | 3,137 | | 3,497 | | 3,564 | | 3,597 | | 3,732 | | 3,901 | |
| 26 | Total | 8,103 | | 8,924 | | 9,458 | | 9,736 | | 10,966 | | 12,687 | |

REGIONAL PROGRAM STUDY CASE

| Line | | 1980-81 | | 1982-83 | | 1984-85 | | 1985-86 | | 1989-90 | | 1994-95 | |
|------|----------------------------------|---------|-------|---------|-------|---------|-------|---------|-------|---------|-------|---------|-------|
| | | MW | M/kWh | MW | M/kWh | MW | M/kWh | MW | M/kWh | MW | M/kWh | MW | M/kWh |
| 27 | Regional rate resources: | | | | | | | | | | | | |
| 28 | | | | | | | | | | | | | |
| 29 | Federal base system | 8,816 | 6.5 | 8,224 | 7.6 | 9,750 | 7.9 | 9,870 | 8.0 | 9,520 | 8.7 | 9,470 | 10.0 |
| 30 | IOU exchange | 0 | | 0 | | 28 | 20.3 | 764 | 20.9 | 2,844 | 24.7 | 5,655 | 31.7 |
| 31 | New resources | 0 | | 0 | | 0 | | 0 | | 0 | | 0 | |
| 32 | Revenue adjustments | | | | | | | | | | | | |
| 33 | Reserve adjustment | | | | | | | | | | | | |
| 34 | Total | 8,816 | 6.9 | 8,224 | 8.1 | 9,778 | 8.4 | 10,634 | 9.6 | 12,364 | 14.6 | 15,125 | 20.1 |
| 35 | Loads: | | | | | | | | | | | | |
| 36 | Preference rate credits | | | | | | | | | | | | |
| 37 | Preference customers | 4,745 | 6.9 | 5,168 | 8.1 | 5,619 | 8.4 | 5,865 | 9.6 | 6,829 | 14.4 | 8,460 | 20.1 |
| 38 | Federal agencies | 221 | 6.9 | 259 | 8.1 | 275 | 8.4 | 294 | 9.6 | 305 | 14.4 | 376 | 20.1 |
| 39 | Preference rate adjustment | | | | | | | | | | | | |
| 40 | IOU (residential and irrigation) | 1,850 | 6.9 | 2,797 | 8.1 | 3,884 | 8.4 | 4,485 | 9.6 | 5,130 | 14.7 | 6,339 | 20.1 |
| 41 | New Resources rate: | | | | | | | | | | | | |
| 42 | Resources: | | | | | | | | | | | | |
| 43 | Federal base system | 1,374 | 6.5 | 516 | 7.6 | 0 | | 0 | | 0 | | 0 | |
| 44 | IOU exchange | 1,850 | 16.2 | 2,797 | 18.0 | 3,856 | 20.3 | 3,721 | 20.9 | 2,280 | 24.7 | 684 | 31.7 |
| 45 | New resources | 0 | 22.4 | 0 | 25.6 | 0 | 28.0 | 0 | 30.4 | 2,675 | 36.6 | 6,272 | 44.8 |
| 46 | Total | 3,224 | 12.1 | 3,313 | 16.4 | 3,856 | 20.3 | 3,721 | 20.9 | 4,965 | 31.2 | 6,956 | 43.5 |

| | | | | | | | | | | | | | | | | | | | | |
|----|----------------------------------|-------|------|-------|------|-------|------|-------|------|--------|------|--------|------|---|---|---|----|---|----|---|
| 47 | Loads: | | | | | | | | | | | | | | | | | | | |
| 48 | Regional rate | 0 | | 0 | | 0 | | 0 | | 0 | | 0 | | 0 | | 0 | | 0 | | 0 |
| 49 | Reserve adjustment | | 3 | | 3 | | 3 | | 3 | | 3 | | 3 | | 3 | | 3 | | 3 | |
| 50 | DSI 75 percent | 2,618 | 12.3 | 3,049 | 16.7 | 3,188 | 20.7 | 3,137 | 21.4 | 3,256 | 31.8 | 3,405 | 44.2 | | | | | | | |
| 51 | Reserve adjustment | | 4 | | 5 | | 5 | | 7 | | 7 | | 8 | | 8 | | 10 | | 10 | |
| 52 | Revenue adjustment | | | | | | | | | | | | | | | | | | | |
| 53 | Preference rate adjustment | | | | | | | | | | | | | | | | | | | |
| 54 | IOU load growth | | | 0 | | 144 | 20.8 | 487 | 21.6 | 1,709 | 33.6 | 3,551 | 45.6 | | | | | | | |
| 55 | Excess resources | 606 | 12.4 | 264 | 16.8 | 604 | 20.8 | 147 | 21.6 | 0 | | 0 | | | | | | | | |
| 56 | Total | 3,224 | | 3,313 | | 3,856 | | 3,721 | | 4,965 | | 6,956 | | | | | | | | |
| 57 | IOU exchange rate: | | | | | | | | | | | | | | | | | | | |
| 58 | Base resources | 8,404 | 16.2 | 9,176 | 18.0 | 9,176 | 20.3 | 9,176 | 20.9 | 9,176 | 23.1 | 9,176 | 26.3 | | | | | | | |
| 59 | New resources rate | 0 | | 0 | | 144 | 20.6 | 437 | 21.6 | 1,709 | 33.6 | 3,551 | 45.6 | | | | | | | |
| 60 | Total | 8,404 | 16.2 | 9,176 | 18.0 | 9,320 | 20.3 | 9,613 | 20.9 | 10,885 | 24.7 | 12,727 | 31.7 | | | | | | | |
| 61 | DSI: | | | | | | | | | | | | | | | | | | | |
| 62 | Loads: | 3,208 | 11.3 | 3,635 | 15.2 | 3,705 | 18.6 | 3,958 | 18.6 | 4,107 | 21.8 | 4,293 | 32.1 | | | | | | | |
| 63 | Reserve credit | | -1.1 | | -1.3 | | -1.7 | | -2.3 | | -3.4 | | -4.3 | | | | | | | |
| 64 | Reserve adjustment | | 2 | | 2 | | 3 | | 3 | | 4 | | 5 | | | | | | | |
| 65 | Preference rate adjustment | | | | | | | | | | | | | | | | | | | |
| 66 | Net | 3,208 | 10.4 | 3,635 | 14.1 | 3,705 | 17.1 | 3,958 | 16.7 | 4,107 | 19.0 | 4,293 | 27.8 | | | | | | | |
| 67 | IRI | 483 | 28.0 | 479 | 32.0 | 488 | 36.0 | 274 | 38.0 | 284 | 46.0 | 296 | 58.0 | | | | | | | |
| 68 | Composite | 3,691 | 12.7 | 4,114 | 16.2 | 4,193 | 19.3 | 4,232 | 18.8 | 4,391 | 20.7 | 4,589 | 29.0 | | | | | | | |
| 69 | Summary | | | | | | | | | | | | | | | | | | | |
| 70 | Preference customer from program | 4,745 | 6.9 | 5,163 | 8.1 | 5,619 | 8.4 | 5,865 | 9.6 | 6,929 | 14.4 | 8,460 | 26.1 | | | | | | | |
| 71 | Federal agency customer | 221 | 6.9 | 259 | 8.1 | 275 | 8.4 | 284 | 9.6 | 305 | 14.4 | 326 | 26.1 | | | | | | | |
| 72 | IOU (residential and irrigation) | 3,700 | 11.5 | 3,996 | 11.0 | 4,316 | 9.6 | 4,485 | 9.6 | 5,136 | 14.7 | 6,339 | 29.1 | | | | | | | |
| 73 | IOU (community and industry) | 4,538 | 16.2 | 4,765 | 18.0 | 5,004 | 20.3 | 5,128 | 20.9 | 5,755 | 24.7 | 6,388 | 31.7 | | | | | | | |
| 74 | IOU composite | 8,238 | 14.1 | 8,761 | 14.8 | 9,320 | 15.4 | 9,613 | 15.6 | 10,885 | 20.6 | 12,727 | 25.9 | | | | | | | |

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REGIONAL PROGRAM STUDY CASE SUMMARY

| | 1980-81 | | 1982-83 | | 1984-85 | | 1985-86 | | 1989-90 | | 1994-95 | |
|---|---------|-------|---------|-------|---------|-------|---------|-------|---------|-------|---------|-------|
| | MW | M/kWh | MW | M/kWh | MW | M/kWh | MW | M/kWh | MW | M/kWh | MW | M/kWh |
| PNUCC base case--90 percent rate increase PNUCC loads (case No. 1): | | | | | | | | | | | | |
| Preference rate credits | | | | | | | | | | | | |
| Prof. cust. from program | 4,851 | 6.9 | 5,319 | 8.1 | 5,912 | 8.9 | 6,262 | 10.5 | 7,775 | 15.7 | 9,929 | 22.0 |
| Fed. agency cust. | 221 | 6.9 | 259 | 8.1 | 275 | 8.9 | 284 | 10.5 | 305 | 15.7 | 326 | 22.0 |
| Preference rate adj. | | | | | | | | | | | | |
| IOU (resid. and irrig.) | 3,736 | 11.5 | 4,072 | 11.0 | 4,415 | 10.0 | 4,598 | 10.5 | 5,375 | 15.7 | 6,421 | 22.0 |
| IOU (comm. and ind.) | 4,668 | 16.2 | 5,104 | 18.9 | 5,547 | 20.4 | 5,798 | 21.3 | 6,933 | 26.3 | 8,601 | 33.7 |
| IOU composite | 8,404 | 14.1 | 9,176 | 14.9 | 9,962 | 15.8 | 10,396 | 16.5 | 12,308 | 21.7 | 15,022 | 28.7 |
| Prof. rate adj. | | | | | | | | | | | | |
| DSI from program | 3,208 | 10.6 | 3,635 | 14.6 | 3,705 | 17.8 | 3,958 | 17.3 | 4,107 | 21.2 | 4,793 | 30.7 |
| Composite | 3,691 | 12.9 | 4,114 | 16.6 | 4,193 | 19.9 | 4,232 | 18.7 | 4,391 | 22.8 | 4,589 | 32.3 |
| NEPP base case--90 percent rate increase NEPP loads (case No. 2): | | | | | | | | | | | | |
| Preference rate credits | | | | | | | | | | | | |
| Prof. cust. from program | 4,745 | 6.9 | 5,168 | 8.1 | 5,818 | 8.4 | 5,865 | 8.6 | 6,929 | 14.4 | 8,466 | 20.1 |
| Fed. agency cust. | 221 | 6.9 | 259 | 8.1 | 275 | 8.4 | 284 | 9.8 | 305 | 14.4 | 326 | 20.1 |
| Preference rate adj. | | | | | | | | | | | | |
| IOU (resid. and irrig.) | 3,736 | 11.5 | 3,998 | 11.0 | 4,314 | 9.6 | 4,485 | 9.6 | 5,130 | 14.7 | 6,339 | 20.1 |
| IOU (comm. and ind.) | 4,538 | 16.2 | 4,765 | 18.0 | 5,204 | 20.2 | 5,128 | 20.9 | 5,755 | 24.7 | 6,388 | 31.7 |
| IOU composite | 8,238 | 14.1 | 8,761 | 14.9 | 9,320 | 15.4 | 9,613 | 15.4 | 10,885 | 20.0 | 12,727 | 25.9 |
| Prof. rate adj. | | | | | | | | | | | | |
| DSI from program | 3,208 | 10.6 | 3,635 | 14.1 | 3,705 | 17.1 | 3,958 | 16.7 | 4,107 | 19.0 | 4,793 | 27.4 |
| Composite | 3,691 | 12.7 | 4,114 | 16.2 | 4,193 | 19.3 | 4,232 | 18.0 | 4,391 | 20.7 | 4,589 | 29.4 |
| 2 percent new resource rate for both PA and IOU PNUCC loads (case No. 3): | | | | | | | | | | | | |
| Preference rate credits | | | | | | | | | | | | |
| Prof. cust. from program | 4,851 | 6.9 | 5,319 | 8.1 | 5,912 | 8.9 | 6,262 | 10.5 | 7,775 | 15.6 | 9,929 | 21.8 |
| Fed. agency cust. | 221 | 6.9 | 259 | 8.1 | 275 | 8.9 | 284 | 10.5 | 305 | 15.6 | 326 | 21.8 |
| Preference rate adj. | | | | | | | | | | | | |
| IOU (resid. and irrig.) | 3,736 | 11.5 | 4,072 | 11.0 | 4,415 | 10.0 | 4,598 | 10.5 | 5,375 | 15.6 | 6,421 | 21.8 |
| IOU (comm. and ind.) | 4,668 | 16.2 | 5,104 | 18.9 | 5,547 | 20.4 | 5,798 | 21.3 | 6,933 | 26.2 | 8,601 | 32.5 |
| IOU composite | 8,404 | 14.1 | 9,176 | 14.9 | 9,962 | 15.8 | 10,396 | 16.5 | 12,308 | 21.6 | 15,022 | 28.5 |
| Prof. rate adj. | | | | | | | | | | | | |
| DSI from program | 3,208 | 10.6 | 3,635 | 14.6 | 3,705 | 17.8 | 3,958 | 17.3 | 4,107 | 21.0 | 4,793 | 30.5 |
| Composite | 3,691 | 12.7 | 4,114 | 16.5 | 4,193 | 19.8 | 4,232 | 18.4 | 4,391 | 22.4 | 4,589 | 31.9 |

REGIONAL PROGRAM STUDY CASE SUMMARY

| | 1980-81 | | 1982-83 | | 1984-85 | | 1985-86 | | 1989-90 | | 1994-95 | |
|--|---------|-------|---------|-------|---------|-------|---------|-------|---------|-------|---------|-------|
| | MW | M/kWh | MW | M/kWh | MW | M/kWh | MW | M/kWh | MW | M/kWh | MW | M/kWh |
| PA loads incr. by 5 percent and IOU loads reduced NEPP loads (Case No. 8): | | | | | | | | | | | | |
| Preference rate credits | | | | | | | | | | | | |
| Prof. cust. from program | 4,745 | 6.9 | 5,168 | 8.1 | 6,018 | 8.9 | 6,277 | 10.2 | 7,394 | 14.9 | 9,602 | 20.5 |
| Fed. agency cust. | 221 | 6.9 | 259 | 8.1 | 275 | 8.9 | 284 | 10.2 | 305 | 14.9 | 326 | 20.5 |
| Preference rate adj. | | | | | | | | | | | | |
| IOU (resid. and irrig.) | 3,700 | 11.5 | 3,996 | 11.0 | 4,316 | 10.1 | 4,485 | 10.2 | 5,130 | 14.9 | 5,339 | 20.5 |
| IOU (comm. and ind.) | 4,538 | 16.2 | 4,765 | 18.0 | 5,004 | 20.3 | 5,128 | 21.0 | 5,755 | 24.9 | 6,388 | 31.8 |
| IOU composite | 8,238 | 14.1 | 8,761 | 14.8 | 9,320 | 15.6 | 9,613 | 16.0 | 10,885 | 20.2 | 12,727 | 26.2 |
| Prof. rate adj. | | | | | | | | | | | | |
| DSI from program | 3,208 | 10.4 | 3,635 | 14.1 | 3,705 | 17.1 | 3,958 | 16.7 | 4,107 | 20.6 | 4,293 | 28.8 |
| Composite | 3,691 | 12.9 | 4,114 | 16.3 | 4,193 | 19.4 | 4,232 | 18.1 | 4,391 | 21.7 | 4,589 | 30.5 |
| PNUCC with 40 percent BPA rate increase | | | | | | | | | | | | |
| PNUCC loads (Case No. 9): | | | | | | | | | | | | |
| Preference rate credits | | | | | | | | | | | | |
| Prof. cust. from program | 4,851 | 5.1 | 5,319 | 6.6 | 5,912 | 8.5 | 6,262 | 11.1 | 7,775 | 16.0 | 9,929 | 22.3 |
| Fed. agency cust. | 221 | 5.1 | 259 | 6.6 | 275 | 6.5 | 254 | 11.1 | 305 | 16.0 | 326 | 22.3 |
| Preference rate adj. | | | | | | | | | | | | |
| IOU (resid. and irrig.) | 3,736 | 10.6 | 4,072 | 10.0 | 4,415 | 9.7 | 4,598 | 11.1 | 5,375 | 16.0 | 6,421 | 22.3 |
| IOU (comm. and ind.) | 4,668 | 16.2 | 5,104 | 18.0 | 5,567 | 20.4 | 5,798 | 21.3 | 6,933 | 26.3 | 8,601 | 33.7 |
| IOU composite | 8,404 | 13.7 | 9,176 | 14.4 | 9,982 | 15.7 | 10,396 | 16.8 | 12,308 | 21.8 | 15,022 | 28.9 |
| Prof. rate adj. | | | | | | | | | | | | |
| DSI from program | 3,208 | 9.7 | 3,635 | 14.2 | 3,705 | 17.8 | 3,958 | 17.3 | 4,107 | 21.6 | 4,293 | 31.0 |
| Composite | 3,691 | 12.1 | 4,114 | 16.3 | 4,193 | 19.9 | 4,232 | 18.6 | 4,391 | 23.2 | 4,589 | 32.6 |
| NEPP with 40 percent BPA rate increase | | | | | | | | | | | | |
| NEPP loads (Case No. 10): | | | | | | | | | | | | |
| Preference rate credits | | | | | | | | | | | | |
| Prof. cust. from program | 4,745 | 5.1 | 5,168 | 6.6 | 5,619 | 8.0 | 5,865 | 10.2 | 6,929 | 14.9 | 8,460 | 20.5 |
| Fed. agency cust. | 221 | 5.1 | 259 | 6.6 | 275 | 8.0 | 284 | 10.2 | 305 | 14.9 | 326 | 20.5 |
| Preference rate adj. | | | | | | | | | | | | |
| IOU (resid. and irrig.) | 3,700 | 10.6 | 3,996 | 10.9 | 4,316 | 9.3 | 4,485 | 10.2 | 5,130 | 14.9 | 5,339 | 20.5 |
| IOU (comm. and ind.) | 4,538 | 16.2 | 4,765 | 18.0 | 5,004 | 20.3 | 5,128 | 20.9 | 5,755 | 24.7 | 6,388 | 31.7 |
| IOU composite | 8,238 | 13.7 | 8,761 | 14.3 | 9,320 | 15.2 | 9,613 | 15.9 | 10,885 | 20.1 | 12,727 | 26.1 |
| Prof. rate adj. | | | | | | | | | | | | |
| DSI from program | 3,208 | 9.4 | 3,635 | 13.7 | 3,705 | 17.1 | 3,958 | 16.5 | 4,107 | 19.4 | 4,293 | 28.1 |
| Composite | 3,691 | 11.8 | 4,114 | 15.8 | 4,193 | 19.3 | 4,232 | 18.0 | 4,391 | 21.1 | 4,589 | 29.9 |

REGIONAL PROGRAM STUDY CASE SUMMARY

| | 1980-81 | | 1982-83 | | 1984-85 | | 1985-86 | | 1989-90 | | 1994-95 | |
|---------------------------------------|---------|-------|---------|-------|---------|-------|---------|-------|---------|-------|---------|-------|
| | MW | M/kWh | MW | M/kWh | MW | M/kWh | MW | M/kWh | MW | M/kWh | MW | M/kWh |
| 9 percent new resource rate for IOU's | | | | | | | | | | | | |
| PRUCC loads (case No. 15): | | | | | | | | | | | | |
| Preference rate credits: | | | | | | | | | | | | |
| Prof. cost. from program | 4,651 | 6.9 | 5,319 | 8.1 | 5,912 | 8.9 | 6,262 | 10.6 | 7,775 | 15.7 | 9,829 | 22.8 |
| Fed. agency cost | 221 | 6.9 | 259 | 8.1 | 275 | 8.9 | 284 | 10.6 | 305 | 15.7 | 326 | 22.8 |
| Preference rate adj. | | | | | | | | | | | | |
| IOU (resid. and irrig.) | 3,736 | 11.5 | 4,072 | 11.0 | 4,415 | 10.0 | 4,588 | 10.6 | 5,375 | 16.4 | 6,421 | 22.8 |
| IOU (comm. and ind.) | 4,668 | 16.2 | 5,194 | 18.0 | 5,567 | 20.4 | 5,790 | 21.4 | 6,933 | 27.0 | 8,601 | 35.0 |
| IOU composite | 8,404 | 14.1 | 9,176 | 14.9 | 9,982 | 15.8 | 10,386 | 16.6 | 12,308 | 22.3 | 15,022 | 29.8 |
| Prof. rate adj. | | | | | | | | | | | | |
| DSI from program | 3,208 | 10.6 | 3,635 | 14.6 | 3,705 | 18.0 | 3,950 | 17.5 | 4,107 | 22.0 | 4,293 | 32.4 |
| Composite | 3,691 | 13.1 | 4,114 | 16.9 | 4,193 | 20.3 | 4,232 | 19.0 | 4,391 | 23.7 | 4,589 | 34.1 |
| 9 percent new resource rate for IOU's | | | | | | | | | | | | |
| NEPP loads (case No. 16): | | | | | | | | | | | | |
| Preference rate credits: | | | | | | | | | | | | |
| Prof. cost. from program | 4,745 | 6.9 | 5,168 | 8.1 | 5,619 | 8.4 | 5,865 | 9.6 | 6,929 | 14.4 | 8,660 | 26.7 |
| Fed. agency cost | 221 | 6.9 | 259 | 8.1 | 275 | 8.4 | 284 | 9.6 | 305 | 14.4 | 326 | 26.7 |
| Preference rate adj. | | | | | | | | | | | | |
| IOU (resid. and irrig.) | 3,700 | 11.5 | 3,996 | 11.0 | 4,316 | 9.6 | 4,485 | 9.6 | 5,136 | 15.7 | 6,336 | 26.7 |
| IOU (comm. and ind.) | 4,538 | 16.2 | 4,765 | 18.0 | 5,004 | 20.3 | 5,128 | 20.9 | 5,753 | 25.0 | 6,585 | 32.4 |
| IOU composite | 8,238 | 14.1 | 8,761 | 14.8 | 9,320 | 15.4 | 9,613 | 15.6 | 10,889 | 20.4 | 12,727 | 26.6 |
| Prof. rate adj. | | | | | | | | | | | | |
| DSI from program | 3,208 | 10.6 | 3,635 | 14.6 | 3,705 | 17.1 | 3,958 | 16.7 | 4,107 | 19.4 | 4,293 | 29.0 |
| Composite | 3,691 | 12.9 | 4,114 | 16.4 | 4,193 | 19.6 | 4,232 | 18.2 | 4,391 | 21.3 | 4,589 | 31.0 |

Mark-up on DSI rate changed from 133 percent to 125 percent PMUC loads (case No. 17):

| | | | | | | | | | | | | |
|---|-------|------|-------|------|-------|------|--------|------|--------|------|--------|------|
| Preference rate credits | | | | | | | | | | -0.3 | | |
| Prof. cust. from program | 4,851 | 6.9 | 5,319 | 8.1 | 5,912 | 8.9 | 6,262 | 10.5 | 7,775 | 15.7 | 9,929 | 22.4 |
| Fed. agency cust. | 221 | 6.9 | 259 | 8.1 | 275 | 8.9 | 284 | 10.5 | 305 | 15.7 | 326 | 22.4 |
| Preference rate adj. | | | | | | | | | | .2 | | |
| IOU (resid. and irrig.) | 3,736 | 11.5 | 4,072 | 11.0 | 4,415 | 10.0 | 4,590 | 10.9 | 5,375 | 16.2 | 6,421 | 22.4 |
| IOU (comm. and ind.) | 4,668 | 16.2 | 5,104 | 18.0 | 5,567 | 20.4 | 5,798 | 21.3 | 6,933 | 26.4 | 8,601 | 33.9 |
| IOU composite | 8,404 | 14.1 | 9,176 | 14.9 | 9,982 | 15.8 | 10,386 | 16.5 | 12,308 | 22.0 | 15,022 | 28.9 |
| Prof. rate adj. | | | | | | | | | | .2 | | |
| DSI from program | 3,208 | 10.6 | 3,635 | 14.6 | 3,705 | 17.8 | 3,958 | 17.2 | 4,187 | 20.1 | 4,293 | 29.0 |
| Composite | 3,691 | 12.9 | 4,114 | 16.6 | 4,193 | 19.9 | 4,232 | 18.7 | 4,391 | 21.7 | 4,589 | 30.7 |
| Mark-up on DSI rate changed from 133 percent to 125 percent NEPP loads (case No. 18): | | | | | | | | | | | | |
| Preference rate credits | | | | | | | | | | - .5 | | |
| Prof. cust. from program | 4,745 | 6.9 | 5,168 | 8.1 | 5,619 | 8.9 | 5,865 | 9.6 | 6,929 | 14.4 | 8,460 | 20.5 |
| Fed. agency cust. | 221 | 6.9 | 259 | 8.1 | 275 | 8.4 | 284 | 9.6 | 305 | 14.4 | 326 | 20.5 |
| Preference rate adj. | | | | | | | | | | .3 | | |
| IOU (resid. and irrig.) | 3,780 | 11.5 | 3,996 | 11.0 | 4,316 | 9.6 | 4,485 | 9.5 | 5,130 | 15.3 | 6,339 | 20.5 |
| IOU (comm. and ind.) | 4,538 | 16.2 | 4,765 | 15.0 | 5,004 | 20.3 | 5,128 | 20.9 | 5,755 | 23.3 | 6,388 | 31.8 |
| IOU composite | 8,238 | 14.1 | 8,761 | 14.8 | 9,320 | 15.4 | 9,613 | 15.6 | 10,885 | 20.3 | 12,727 | 26.2 |
| Prof. rate adj. | | | | | | | | | | .3 | | |
| DSI from program | 3,208 | 10.4 | 3,635 | 14.1 | 3,705 | 17.1 | 3,958 | 16.7 | 4,017 | 18.3 | 4,293 | 26.3 |
| Composite | 3,691 | 12.7 | 4,114 | 16.2 | 4,193 | 19.3 | 4,232 | 18.0 | 4,391 | 19.8 | 4,589 | 28.2 |

Appendix G

CONGRESSIONAL RECORD—HOUSE

September 29, 1980 (daily ed.)

Page H 9848

Mr. DINGELL. Mr. Chairman, I yield myself 4 minutes.

Mr. Chairman, the Pacific Northwest Electric Power Planning and Conservation Act is vitally needed in order to solve an electric power planning problem that, absent such a solution, is virtually certain to cause disruption in that region. The committee has given this bill the most careful consideration. We have explored every issue in depth and shaped the provisions of the bill. We have held hearings in the region and here in Washington, D.C. Unlike earlier versions which I strongly opposed, it represents a sound and rational solution to the impending crisis facing that region. I strongly urge your support.

The bill grants expanded authority to the Bonneville Power Administrator to acquire additional power on a long-term basis, but with significant and important safeguards. This authority will enable the Administrator to sign new contracts with his customers. Absent this authority, a regional dispute over access to existing low-cost power under current law will leave electric power planning in chaos.

. . .

Before closing, I want to express my appreciation for the hard work and great assistance our committees received from many of our colleagues on both sides of the aisle, from both within and outside the region. Their help and expertise and that of their staff was essential to our consideration of this legislation. I particularly want to commend Congressman SWIFT, who is the chief sponsor of the Commerce-Interior compromise, and Congressmen FOLEY, BONKER, DUNCAN of Oregon, DICKS, ULLMAN, MCCORMACK, SYMMS, and PRITCHARD for their untiring efforts to bring this bill to the floor today. Chairman STAGGERS and UDALL

and Chairman KAZEN, as well as Congressman BROWN of Ohio, Congressmen SHARP, CLAUSEN, and LUJAN, all of whom have no constituents in the region, also provided significant assistance in shaping this legislation in a way that is helpful to the region, and not harmful to other parts of the Nation.

I want also to thank Senators JACKSON, HATFIELD, MAGNUSON, CHURCH, McCLURE, and their staff for the cooperation we have received from the other body.

I want to thank the Administrator of the BPA for the technical assistance we have received from him and his staff, particularly, Mr. Larry Hittle, who has spent long hours on the technical aspects of this legislation for our committee, Dr. Terry Holubitz of Pacific Fisheries Commission and Mr. Bruce Miser, public power counsel, as well as others in the region have also been helpful to us.

[H 9849]

Last, I also want to express the deep appreciation on behalf of myself and Chairman UDALL to the staff of our committee and that of the Interior Committee for the work that has been done in preparing this legislation, as well as the staff of the House legislative counsel. I particularly want to call attention not only to the professional staff of the committee, but also to the administrative staff of both committees and the administrative staff of the legislative counsel who worked long hours on the legislation.

[H 9864]

MR. FOLEY

B. Why the Bill is Needed:

1. BPA supplies 50 percent of the Northwest's power. This power supply cannot be increased under existing law. The entire amount is already committed by contract to utilities and industries who are BPA customers. All these contracts expire between 1981 and 1994. All of BPA's limited

power supply must therefore be reallocated. If the reallocation is made by BPA (beginning next year), it will be the object of a decade of divisive law suits. If the reallocation is instead made by Congress, through this bill, it cannot be litigated and the region's divisiveness on power matters will be combined to less disruptive disputes.

. . .

C. How the Bill Meets These Needs:

1. The bill solves the BPA power reallocation problem by (a) authorizing BPA to acquire power from non-federal sources if needed to meet BPA customer loads, so that the need to reallocate is eliminated, and (b) specifying directly how much power each class of BPA customer is to receive, and at what cost. (The bulk of the bill consists of protections to insure that BPA's new authority is used first for conservation and renewables, and to insure effective regional and Congressional control to prevent any abuse of this new authority.) The bill's allocation system is the heart of the regionally-negotiated "peace" settlement, and is supported by all classes of BPA customers.

Appendix H
DSI Contract, (1981)
[3787]

(7) *Restriction of Deliveries*

(c) *First Quartile Restriction Rights.* Bonneville may restrict deliveries of Industrial Firm Power in amounts up to 25 percent of the Purchaser's Operating Demand, at any time and for any reason in order to protect Bonneville's ability to meet its Firm Obligations, subject to the provisions of this subsection. Bonneville may also restrict deliveries in such amounts for the purpose of displacing the operation or use of Federal System resources, if and to the extent that displacement is consistent with Bonneville's legal rights, legal obligations, and policies concerning displacement. Such restriction shall not be made for the purpose of selling nonfirm energy under NF-1 rate schedule, its successor, or any other rate schedule. Except as provided in paragraph (2) below, Bonneville shall not be obligated to plan for or acquire resources for the purpose of serving the Purchaser's First Quartile load, but Bonneville will treat the Purchaser's First Quartile as a firm load for purposes of resource operation, which firm load shall be subject to the restriction rights provided by this subsection.

* * *
[3789]

(d) *Second Quartile Restriction Rights*

(1) In order to meet its Firm Obligations, Bonneville may restrict deliveries of Industrial Firm Power to the Purchaser consistent with paragraphs (f)(3), (f)(4) and (j)(3) below in amounts up to the lesser of: (i) 25 percent of the Purchaser's Operating Demand, or (ii) the Purchaser's share, based on Operating Demand, of the amount by which Bonneville is unable to meet its Firm Obligations by reason of power and energy unavailable due to:

Delay.

(A) a delay from the initially planned date of commercial operation of a Federal System generating unit

or Conservation Investment Resource, subject to subparagraph (C) below:

Unexpected Poor Performance.

(B) (i) unexpected poor performance of a planned Federal System generating unit or Conservation Investment Resource which fails to attain initially its design capability for technological reasons including, but not limited to, design error or equipment failure, subject to subparagraph (C) below;

(ii) the inability of an existing, or a new, Federal System generating unit or Conservation Investment Resource that has [3790] attained commercial operation to perform at its expected capability for technological reasons including, but not limited to, design error or equipment failure, as determined by Bonneville or an appropriate regulatory agency having jurisdiction; or

Governmental Order.

(C) a delay or failure to attain capability pursuant to subparagraphs (A) and (B)(i) above, but not subparagraph (B)(ii) above, if such conditions are due to the order or orders of any governmental agency having jurisdiction over such matters; *provided however*, that laws or ordinances enacted by legislative bodies or through ballot measures shall not be considered orders of governmental agencies.

The total of restrictions pursuant to this subsection and the amount of curtailment of the Second Quartile pursuant to section 9(c) shall not at any time exceed 25 percent of the Purchaser's Operating Demand.

(2) *Federal System Operating Reserve.* In order to protect Bonneville's Firm Obligations from occurrences that otherwise might require Bonneville to restrict such Firm Obligations during the Contract Year of such occurrences, Bonneville shall have the right to make restrictions

during such Contract Year pursuant to subparagraphs (1)(B)(i) and (ii) above, subject to the limitations contained herein and in paragraphs (4), (5) and (6) below.

(A) Restrictions pursuant to subparagraph (1)(B)(i) above shall be limited, in the Contract Year of occurrence, to the lesser of [3791] 25 percent of the Purchaser's Operating Demand or the Purchaser's share, based on Operating Demand, of one-half the amount of energy by which Bonneville estimates, after such occurrence, but prior to acquiring or recalling additional resources and prior to an actual restriction or region-wide appeal hereunder, that it will be unable to meet its Firm Obligations during the remainder of such Contract Year because of such occurrence. If the occurrence continues in subsequent Contract Years, such limitation to the Purchaser's share of one-half the amount of energy shall not apply during such subsequent Contract Years, and Bonneville shall give notice of potential restriction, if necessary, pursuant to paragraph (f)(3) below, and subject to the limitations contained in subsection (f) and this subsection.

(B) Restrictions pursuant to subparagraph (1)(B)(ii) above shall be limited to the lesser of 25 percent of the Purchaser's Operating Demand or the Purchaser's share, based on Operating Demand, of one-half the amount of energy by which Bonneville estimates that it will be unable to meet its Firm Obligations because of such occurrence. In the case of such restrictions during the Contract Year of occurrence, such limitation shall be calculated for the remainder of the Contract Year, prior to and excluding the effects of the acquisition or recall of additional resources after such occurrence, and of any actual restriction or region-wide appeal hereunder. In the case of such restrictions for each subsequent Contract Year, such limitation shall

continue and shall be reflected in any notice pursuant to paragraph (f)(3) below.

[3792]

(C) Bonneville shall give as much notice of an actual restriction hereunder as is practicable under the circumstances, but in no event less notice than that required to permit an orderly reduction of any portion of the Purchaser's operation that may be reduced as a result of such restriction. In the event of an actual restriction, the Purchaser may submit a proposal under which the Purchaser will provide Bonneville the energy associated with the actual restriction, in accordance with subparagraph (f)(4)(D) below.

(D) Simultaneously with any actual restriction pursuant to subparagraphs (1)(B)(i) and/or (1)(B)(ii) above, Bonneville shall publicly call for a region-wide voluntary curtailment of non-essential uses of electric energy, and shall include in its region-wide appeal the information that Bonneville's ability to continue to meet its Firm Obligations depends on such voluntary curtailment as well as on actual restrictions of the Purchaser's load hereunder. In the case of actual restrictions imposed in Contract Years subsequent to the year of occurrence, such appeal shall be made simultaneously with such actual restrictions. All such appeals shall be repeated at regular intervals during any period when actual restrictions hereunder remain in effect.

(3) (A) Prior to its determination of the planned capabilities and planned completion dates of Federal System resources or Conservation Investment Resources that Bonneville plans to use to meet its Firm Obligations, other than Federal System resources committed to prior to the Effective Date, Bonneville shall afford to the Purchaser a [3793] reasonable opportunity to review and comment upon: (i) the preliminary determinations of such capabilities and dates, and

(ii) the methodology used by Bonneville as the basis for such determinations. Such opportunity shall be afforded only for the purpose of assisting Bonneville in assembling information, including but not limited to technical data, that may be useful to Bonneville in making its final determinations as accurate and realistic as possible. The same opportunity shall be afforded by Bonneville prior to any significant adjustment in such capabilities or completion schedules if adjustments in previously planned capabilities or completion dates are proposed for resources to be included in future final lists furnished pursuant to subparagraph (B) below. In the case of non-major resource programs involving more than one individual resource, Bonneville may to the extent necessary and appropriate determine the planned capability and planned completion date of the program as a whole, rather than specify individual resource capabilities and completion dates, and in such a case Bonneville shall also specify the average planned capability per individual unit, the planned number of units, and the planned schedule of implementation.

(B) Bonneville shall furnish the Purchaser by each June 1 a list of Federal System resources and Conservation Investment Resources for which the Purchaser's Second Quartile provides a reserve for the following Contract Year, listing initially planned completion dates and capabilities determined after the opportunity to [3794] comment pursuant to subparagraph (A) above. Such annual list shall be deemed a part of this contract. Such list shall be final for purposes of determining potential restrictions in such Contract Year in the case of restrictions for which notice is required prior to such Contract Year.

(4) (A) Delays in the construction of generating units to the extent caused by insufficient appropriated funds,

or delays in the implementation of Conservation Investment Resources to the extent caused by a demonstrable insufficiency of funding, shall not be a cause for restriction of Industrial Firm Power under this subsection.

(B) Bonneville shall use its best efforts consistent with its legal obligations to avoid any delays, unexpected poor performance, or other reductions in resource capability to which it is entitled, including but not limited to delays or other reductions required by order of any governmental agency having jurisdiction, if such resource capability is needed to serve Bonneville's Firm Obligations.

(5) In order to avoid making or continuing a restriction of Industrial Firm Power under this subsection, Bonneville shall acquire or recall any electric power and energy which it is legally authorized to acquire or recall from any source, including the Industrial Purchasers, and which is available at a Reasonable Cost.

(6) No restriction or right to restrict pursuant to this subsection shall be effective for more than seven years from the date of the event described in paragraph (1) above which gave Bonneville the right to restrict. Following loss or other reduction of resource capability for [3795] any cause, Bonneville shall use its best efforts, consistent with prudent utility practice and its obligations under the Regional Act and other applicable provisions of law, to plan for and to acquire resources sufficient to meet any resource deficiency caused by resource capability which is delayed or otherwise reduced for any reason to the extent such capability is required to enable Bonneville to meet its Firm Obligations.

(7) Delay from the initially planned date of commercial operation of a planned Federal System resource, which in Bonneville's sole determination is due to an estimated lack

of Firm Obligations to support the need for a resource (Resource Slowdown), shall not be a cause for restriction under subparagraph (1)(A) above. In the event of such a determination, the limitation period specified in paragraph (6) above shall be suspended for the duration of such Resource Slowdown due to lack of Firm Obligations, and the initially planned date of commercial operation of the resource shall (for the purpose of measuring delay) be changed to the new date selected after the Resource Slowdown has ended.

(8) *Conservation Investment Resources.*

(A) The restriction rights provided in paragraph (1) above shall be available to protect Bonneville's ability to meet its Firm Obligations in the event of the delayed completion or unexpected poor performance of planned Conservation Investment Resources that are implemented or acquired by Bonneville or, if implemented or acquired by another entity, relied upon by Bonneville in the calculation of its ability to meet its Firm Obligations.

(B) The term "Conservation Investment Resource" shall mean a conservation measure or resource for which power is (or is planned to [3796] be) saved by means of physical improvements, alterations, devices or other installations measurable in units, as distinct from conservation efforts that rely upon or promote changes in Consumer behavior. The restriction rights provided by this subsection (d) are not intended to, and do not, provide a reserve for unanticipated load growth, including unanticipated load growth caused by the failure of Consumers to behave in a manner that saves energy.

(C) Bonneville shall include in the list of resources to be made available to the Purchaser pursuant to subparagraph (3)(B) above those Conservation Invest-

ment Resources to which this subsection applies. A description of the Conservation Investment Resource, its planned schedule of implementation, and the planned savings it is expected to achieve for each Contract Year during such schedule, shall also be included for the purpose of determining planned completion dates and planned performance. Such list shall also include the available information on the actual rate of implementation of such resource in the case of lists made available to the Purchaser after the planned date on which implementation of the resource was to have begun.

(D) For purposes of determining the amount of electric power and energy planned to have been saved but not saved in fact by any such Conservation Investment Resource, the following formula shall be used to compute actual savings achieved in each Contract Year, and such savings shall be deemed to have been achieved in the absence of reliable evidence to the contrary:

[3797]

$$A_s = \frac{A_u}{P_u} \times P_s, \text{ or } A_s = A_u \times \text{planned savings per unit}$$

where:

A_s = actual savings deemed achieved;

A_u = actual physical units improved, altered, installed or otherwise appropriately implemented;

P_u = physical units planned to have been improved, altered, installed or otherwise implemented; and

P_s = planned savings (to be determined by multiplying planned savings per unit times P_u).

(E) The determination of P_u , P_s , and planned savings per unit in the foregoing formula shall be made independently by Bonneville for all Conservation Investment Resources, on the basis of historical experience and realization factors, and other available in-

formation likely to help produce realistic values for these variables; *provided, however*, that in the case of Conservation Investment Resources relied upon by Bonneville in the calculation of its ability to meet its Firm Obligations but planned to be implemented or acquired by another party, such determination may be made through a process selected by Bonneville and available for review and comment by the Purchaser as contemplated in paragraph (d)(3) above. Such determination shall give particular weight to the appropriate historical experience, if any, with similar resources, which shall be the starting point in determining the estimated amount of power those types of resources may produce, with the goal of arriving at values for P_a and P_s that are likely to [3798] equal A_a and A_s , respectively. The parties agree that the objective of a Conservation Investment Resource program is that P_a should not exceed A_a , and P_s should not exceed A_s , except for unforeseeable reasons, and that the values adopted for P_a and P_s should be readily achievable in actual practice.

(F) In accordance with the foregoing provisions, a Conservation Investment Resource shall be deemed to have been delayed in completion or to have had unexpected poor performance if, and to the extent, that A_s is less than P_s , each determined as set forth above. Bonneville shall make such determination of A_s prior to each June 1, based on A_s for the prior calendar year.

(G) If and when Bonneville learns that A_s is less than P_s for any given Conservation Investment Resource, at any point during the implementation of such resource, subject to the provisions of paragraph (6) above, Bonneville shall take appropriate steps to replace the capability unavailable to it, as if a planned generating resource had been delayed in completion or had failed to achieve its designed capability.

[3833]

14. Definitions

(h) "*Firm Obligations*" means all of Bonneville's firm commitments to supply electric power and/or energy (Firm Commitments):

(1) existing on the Effective Date,

[3834]

(2) in the Region incurred on or after the Effective Date,

(3) other Firm Commitments that Bonneville may incur that are supported by Bonneville's firm resources when incurred.

Seventy-five percent of the Industrial Purchasers' Operating Demands shall be a Firm Obligation for purposes of both resource planning and operation, and, in addition, 25 percent of such Operating Demands (the Industrial Purchasers' First Quartiles) shall be a Firm Obligation for the purpose of resource operation only, subject to restriction provisions pursuant to section 7. In its application of restrictions pursuant to section 7, and in its operations pursuant to section 8, Bonneville shall first serve the remaining 75 percent of the Industrial Purchasers' loads before serving the Industrial Purchasers' First Quartiles.

[3835]

(i) "*Industrial Firm Power*" means a unified class of electric power which Bonneville will make continuously available to the Purchaser on a Contract Demand basis subject to:

(1) the restriction applicable to deliveries of all firm power pursuant to Uncontrollable Forces and Continuity of Service provisions of Exhibit B;

(2) the additional restrictions that apply to the Purchaser under section 7; and

(3) a restriction which is made necessary because the operation of generation or transmission facilities used by Bonneville to serve the Purchaser and one or more priority and new resource firm power purchasers is suspended, interrupted, interfered with, curtailed, or restricted as a result of the occurrence of any condition described in the Uncontrollable Forces or Continuity of Service provisions of Exhibit B, at which time Bonneville shall restrict the Purchaser's Operating Demand for Industrial Firm Power to the extent necessary to prevent, if possible, or minimize restriction of priority and new resource firm power; the extent of such restrictions shall be limited for Industrial Firm Power by section 7 of this contract.

. . .

[3836]

(o) "*Quartile*" means 25 percent of the Purchaser's Operating Demand. "*First Quartile*" means the 25 percent of the Purchaser's Operating Demand which is not treated as a firm load for Bonneville's resources acquisition planning purposes.

Appendix I

VIII Contract Official Record 2334

DEPARTMENT OF ENERGY [Letterhead]

Office of the Administrator

Bonneville Power Administration

P.O. Box 3621

Portland, Oregon 97208

AUG 19 1980

Honorable Abraham Kazen, Jr.
Chairman, Subcommittee on Water
and Power Resources
Interior & Insular Affairs
House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

During the markup of S.885, the Pacific Northwest Electric Power Planning and Conservation Act, in the Subcommittee on Water and Power Resources, you requested subcommittee staff to obtain from BPA an analysis of the rates projected for direct-service industrial customers (DSIs) under the legislation, as well as the approximate cost of power in the Northwest from new resources and from resources that were developed at the time each DSI facility was first constructed. Following discussions with your staff, BPA has prepared the information that follows. We hope it will be of assistance to you.

I. Chart Shown in Appendix I

The chart shown in Appendix I will be referred to throughout these comments, and a brief explanation of it may assist you in your review of the narrative material that follows.

The line designated A represents the currently projected DSI rates under the legislation, through the operating year 1994-95. The derivation of these rates is explained

in the next section of these comments. The top line (designated A') is the projected DSI rate under the legislation before adjustment for the value of reserves the DSIs provide.

The middle line (designated B') represents the currently projected wholesale firm power rates for BPA's public body and cooperative customers, i.e., preference utility systems that purchase power from BPA at wholesale for resale to their own consumers. Under BPA's present rate schedule DSIs are charged virtually identical rates as the preference customers (the availability credit given to the DSIs for interrupting their load is the main difference).

[2335] The wholesale rate to public bodies and cooperatives is used, under the legislation, as one component of the DSI rate in the period after July 1, 1985. It is combined with the cost of new resource for their assumed new large industrial loads to estimate the wholesale firm rate for all preference customer industrial loads (line designated B').

The bottom line (designated C) represents the rate that the DSIs would be charged if—hypothetically—their essentially fixed loads continued to be served, as they are today, by resources currently committed to BPA's loads. This line rises as it moves to the right to reflect projected inflation in the operation and maintenance costs of existing resources and the cost of resources currently under construction.

It may help in examining the chart to know that with a total power consumption (firm and non-firm) of roughly 3500 average megawatts (MW), each one-mill increase in the DSI rates costs the DSIs, and returns to BPA, an additional \$30.7 million per year.

II. DSI Rates Under S.885

As shown on the chart, and as explained in greater detail below, the legislation essentially converts the DSIs from consumers at wholesale rates to consumers at retail

rates. The additional revenue collected from the DSIs as a result of this change in rate policies provides the money needed to extend the benefits of relatively low-cost power to the region's residential and small farm consumers (through the exchange provisions of section 5(c)). In other words, the surrender by the DSIs of their existing contracts in return for new long-term contracts at higher rates under the bill is what "frees up" low-cost power for the residential and small farm consumers of privately-owned utilities (who under the preference clause are not now eligible for firm power from BPA).

BPA's actual rate directives for all regional customers are set forth in section 7 of the bill. As you know, these directives do not in themselves establish actual rates for any of BPA's customers. Instead, the rate directives specify how those rates should be calculated, based on an allocation of costs. The actual costs will depend on many factors and are not, of course, yet known. For this reason, all projected rates under the legislation are estimates, and the estimates are based on assumed values for each variable. The assumptions used in computing the rates shown on the chart are listed in Appendix II. The sensitivity of the rate projections to changes in the assumed values of individual variables is suggested by the sensitivity analysis included in the Senate Report on S.885 as Appendix B (although the absolute figures in that document would be different if, as in these comments, updated costs and assumptions were used).

The rate directives incorporated in section 7 were a "rate package" proposed by the Public Power Council after long and intensive discussions within the region, and represent a consensus of all classes of BPA customers plus the Northwest states and local governments. These provisions were incorporated in S.885 in the Senate and have been retained intact in all three markups conducted thus far in the House of Representatives.

[2336] The DSI rate directives may be found in section 7(c), and cover two time periods: the pre-1985 period and the post-1985 period. Prior to July 1, 1985 the DSI rates are to be established at a level designed to recover both the costs of the BPA resources necessary to serve these loads and the otherwise unrecovered costs of the section 5(c) power exchanges carried out for the benefit of the region's residential and small farm consumers. By 1985, as indicated on the chart, this means the DSI rate is projected to be a third again higher as the rate for public bodies and cooperatives, and therefore about the same as the retail industrial rates charged by such utilities to their own industrial customers in the region.

After July 1, 1985, the rate directive specifies that the DSI rate is to be equitable in relation to the retail rates charged by public bodies and cooperatives to their own industrial customers in the region. The calculation of an "equitable" rate is required to be made by adding a typical retail utility margin (or "markup") to a wholesale power cost. The wholesale is in turn required to be the rate at which BPA sells to public bodies and cooperatives the power these utilities use to serve their own industrial loads; this means a weighted average of sales under the section 7(b) rate and sales under the section 7(f) rate, since the latter rate would apply for sales of BPA power to these utilities to the extent any new industrial loads of the utilities fall within the definition of "new large industrial load" contained in section 3(14) of the bill. This weighted average is represented on the chart by the line B'. When the typical retail markup is added to the amounts indicated on line B' the typical public agency industrial retail rate for firm power results line A'. When it is then adjusted for value of reserves (i.e. this adjustment reflects the less than firm power the DSI's purchase from Bonneville), the DSI rate indicated on line A results.

During both periods, as today, BPA must separately adjust the DSI rates to reflect a separate aspect of their power, namely the provision of system reserves through BPA's rights to interrupt or withdraw power from the DSIs when needed to protect other firm loads within the region. Providing system reserves is a service BPA undertakes for its firm power customers, the cost of which is borne by all BPA customers including the DSIs. BPA currently charges the DSIs for all their power as if it were firm, rather than charging a lower rate for the power that BPA may interrupt, and provides the DSIs with a rate credit—a retroactive rate adjustment—only when an interruption actually occurs. Subsection 7(c) requires that BPA adjust the DSI rates based on the value of the system reserves provided through BPA's rights to curtail service to these loads. This means that BPA as part of its rate filings must investigate and put a price on alternative methods of providing equivalent reserves.*

[2337] It should be emphasized that the rate directives govern only the total amount of revenue to be collected from each class of customer, not the rate form used to recover this revenue (see section 7(e)). This of course applies to the DSI rates, whose form—including the form of the credit for interruptions—is not determined by the bill. BPA will be receptive to all suggestions on rate design issues.

Four additional points should be made. First, the rate estimates shown in Appendix I reflect the cost and load assumptions indicated in Appendix II. If actual costs or loads turn out to be higher, the actual DSI rates will be higher. If, on the other hand, actual costs or loads turn out to be lower, all BPA customers (including the DSIs) will benefit in the form of lower rates.

*There are several additional reasons why the DSIs loads, both historically and today, increase the efficiency of the system and reduce overall power costs for the region, but these appear to be beyond the scope of your present inquiry.

Second, these rate estimates show the costs only of that power the DSIs buy from BPA, which is not the same as the actual power costs experienced by the DSIs. When the DSIs are interrupted, as they have been for increasingly longer periods each year, they must either curtail production or purchase more expensive replacement energy from non-Federal sources. Either alternative raises DSI power costs above the BPA rate, sometimes substantially.

Third, the DSI rate directive is intended over time to put the DSIs on a comparable basis with most of the region's other industries, and particularly those industries served by the utility systems that would be most likely to serve the DSIs in the absence of this legislation. One result of this transition to "retail" status from "wholesale" status is that the present economic advantage enjoyed by the DSIs over similar industries in other parts of the nation will apparently come to an end, particularly when the cost of power interruptions and transportation are taken into account. (These conclusions may be found in the 1979 report of the Department of Commerce based on earlier estimates of the DSI rates under legislation.)

Fourth, the DSIs are the only customer class whose rates will be increased as a result of this legislation. In addition, the price of obtaining new long-term contracts at these higher rates is, for the DSIs, the surrender of their existing long-term contracts which have not yet expired, and under which (as indicated above) they essentially pay wholesale rates for their power. BPA's ability to implement this legislation does depend on the willingness of the DSIs to accept this change of contract status and the higher power costs that go with it.

III. Cost of Power From Old and New Resources

You also requested an analysis of the cost of power from various Northwest resources, particularly new resources coming on line today and resources that came on line in the era when the DSI facilities were first built in the region.

[2338] The comparison of old and new power costs may be aided by noting first the cost of BPA power from resources in existence today. These costs are basically those indicated by line C on the chart in Appendix I. That BPA's projected costs for all customer classes are higher than those shown on line C illustrates the high cost of new resources, including conservation, which are needed to deal with load growth occurring within the region. As you know, this load growth is almost exclusively utility load growth. The DSI loads are essentially fixed in size by present contracts, and section 5(d) of S.885 would require that future DSI power entitlements be limited to present DSI power entitlements. Thus, if the DSI loads in existence today were simply served with resources currently committed to BPA's loads, their future rates would be those indicated on line C. Such rates, however, would require that utilities pay the entire cost of their own load growth, with no increased contribution from the DSIs. A question that would need to be studied in order to justify such a rate is whether the DSI's accrue any benefits or costs from the region's increased growth. To the best of our knowledge, this is not a pricing system that anyone has seriously considered for the Pacific Northwest or any other region.

The cost of new resources needed to meet utility load growth depends, of course, on many factors, including the type of resource and its date of implementation or construction. In general, there appear to be opportunities for some conservation programs in the Northwest that will "produce" power at a cost as low as 20 mills per kWh. By contrast, power from coal-fired and nuclear power plants currently under construction but not yet completed in the Northwest are projected to range from 45 mills per kWh to 60 mills per kWh when inflation is included (as it is in all projections used in these comments.) The reason, incidentally, that the DSI rates have more than doubled since 1979 is that the DSIs are required to share in the cost of new resources already being acquired by BPA under existing authority.

The cost of new resources at the time the DSI facilities were first constructed was, of course, far lower than the cost of new resources today. BPA did not substantially increase its rates for the first time until 1974, by which time virtually all the present DSI load was already in existence. Prior to 1974, the average BPA rate was 2.4 mills per kWh, reflecting the low embedded costs of an almost exclusively hydroelectric BPA system. The chart below shows the date of first construction for each DSI facility and their major additions and the approximate cost of new resources during that era, as well as the then-effective basic BPA rate:

[2339]

| <u>Facilities (Contract Additions)</u> | <u>Years Covered</u> | <u>Approx. New Gen. Resource Cost (Includes Transmission)</u> | <u>Average BPA Rate</u> |
|---|--------------------------|---|---------------------------------|
| Alcoa, Oregon Shipbuilding | 1939-40 | 1.8 | 2.0 |
| Dupont, Kaiser, Reynolds, Union Carbide | 1941-45 | 1.8 | 2.5 |
| Alcoa, Carborundum, Keokuk, Kaiser, Reynolds | 1946-50 | 1.9 | 2.4 |
| Alcoa, Hanna, Harvey, Kaiser, Reynolds, Victor | 1951-54 | 2.0 | 2.5 |
| Anaconda, Cerro, Hanna, Kaiser, Penn Salt, Reynolds, Victor, Webb & Knapp | 1955-62 | 2.0 | 2.3 |
| Alcoa, Anaconda, Carborundum, Cominco, G-P, Intalco, Kaiser, Monsanto, Penn Salt | 1963-66 | 2.4 | 2.4 |
| Alcoa, Anaconda, Dow, Hanna, Intalco, Kaiser, Martin- Marietta, ORMET, Reynolds | 1967-73 | 2.9 | 2.4 |
| Carborundum, Crown Z, Hanna, Kaiser, Penn Salt, Reynolds, Stauffer, Union Carbide | 1974-78 | 5.4 | 3.0 |

Two additional comments should be included in the discussion of these resource costs. First, as you know, the DSIs receive a mixture of firm and non-firm power, unlike other BPA customers. Half the energy and all of the capacity associated with the DSI loads may be interrupted or withdrawn by BPA under certain circumstances

to meet the firm power needs of other customers (see Appendix III). As a result, only about half the DSI power could even theoretically be used by utilities for serving the loads of other types of customers, including load growth. The other non-firm half of the DSI Load represents reserves that the region would have to carry in some form in any event. In the absence of the DSIs, it might be difficult for BPA and the region to earn equivalent revenues from the sale of this reserve capacity and reserve energy. Thus, while the DSI firm load represents roughly 1.7 large new conventional power plants, the fact that the DSI power is nonfirm saves the region the need for another 1.7 conventional power [2340] plants of the same size (or their equivalent). This is one reason why, from a rate impact standpoint, it is beneficial for other consumers that the DSIs are part of the regional power system in the Northwest.*

Second, since the DSIs today and under the legislation pay rates that recover considerably more than the costs of the existing resources used to serve their loads, the cost of load growth is felt by non-DSI customers much less severely than it would be if these loads did not exist. Turning again to the chart in Appendix I, the difference between line C and line B in effect represents payments the DSIs make in order to pay their proportionate share of the costs of load growth, although their loads are not growing. The difference between line B and line A represents the additional amount paid by the DSIs under the bill primarily in order to make lower cost power available to the region's residential and small farm consumers through the mechanism of the section 5(c) exchange.

*There are several additional reasons why the DSIs loads, both historically and today, increase the efficiency of the system and reduce overall power costs for the region, but these appear to be beyond the scope of your present inquiry.

We hope this information will assist you in your consideration of S.885. I would be happy to provide additional information should you or your staffs desire it. At the request of the subcommittee staff we are forwarding copies of this letter to members of the subcommittee.

Sincerely,

Administrator

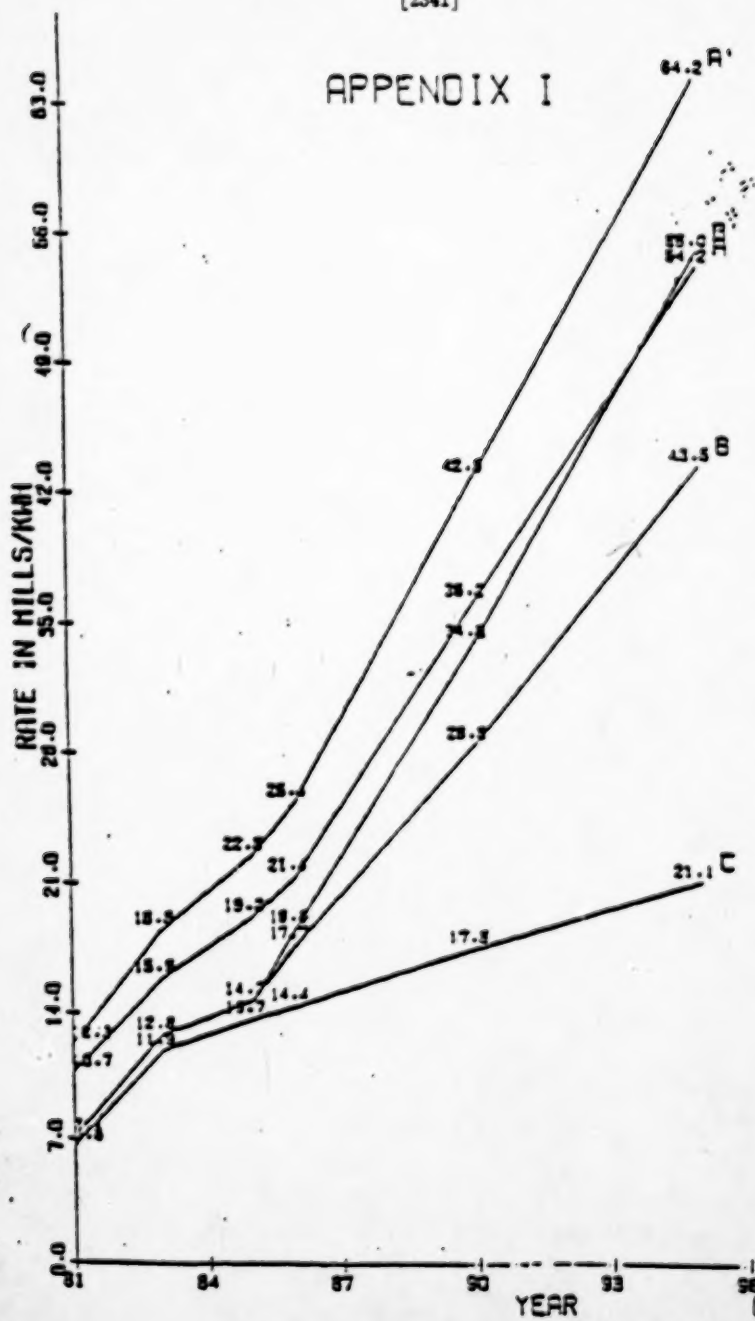
3 Enclosures

cc:

Congressman Jim Weaver

Mr. Manuel Lugan, Jr.

APPENDIX I



[2342]

APPENDIX II

Assumptions in Developing the Appendix I Graph.

The stream of numbers used to develop the Appendix I graph were obtained from the Rate Directives Analysis of the Pacific Northwest Electric Power Planning and Conservation Act. Specifically, A was obtained from line 66, B from line 34, and C from line 29. See the attached "Regional Program Study Case". B' was calculated by dividing the amount of mark up used to convert public utilities' industrial wholesale power costs into retail rates into line 62. The markup for 1986, 1990, and 1995 was 33%, 24%, and 15%, respectively. "Base Data" lists the inputs used in running the Rate Directives Analysis computer program that produced the attached "Regional Program Study Case". The "Assumptions Used in Development of the Base Data for Numerical Analysis" is precisely that. For further assumptions or a line by line explanation of the Rate Directives Analysis we refer you to the S. 885 legislative history Appendix B.

[2343]

Assumptions Used In Computing The Rates
Shown In Appendix I

RESOURCES

I. Federal Base System These amounts are estimates of the total Federal hydro and net-billed thermal power expected to be available for sale under the program. Federal base system power costs are derived by estimating the cost of transmitting Federal power on the BPA grid, the cost of generating Federal power from hydroelectric projects, and the cost of operating the net-billed thermal plants. The costs of these resources are spread over total estimated Federal energy resources including secondary resources in arriving at the expected

sales rate. The following schedule of future wholesale power rate increases was used to determine costs levels:

| <u>Date of Rate Increase</u> | <u>Percent Over Previous Year's Rates</u> |
|--------------------------------------|---|
| July 1981 | 50 |
| July 1982 | 20 |
| July 1983 | 10 |
| July 1984 | 5 |
| July 1985 | 5 |
| July 1986 | 5 |
| July 1987 | 5 |
| July 1988 | 5 |
| July 1989 | 5 |
| July 1990 | 5 |

After 1990, a 3.5-percent rate increase was assumed each year. These cost estimates include an additional six-month delay for completion of the WPPSS projects: No. 1, 12/85; No. 2, 7/83; and No. 3, 12/86. All cost estimates in the Regional Bill rate analysis are in current dollars of the fiscal year in which the rates will be in effect.

2. IOU Base System. These amounts are the IOU system resources planned to be in service by 1983. Prior to 1983, the level of resource was set equal to the IOU total system load. The rates associated with these resources are estimates of the average delivered cost, in the year shown, of all private utility resources expected to be operating by 1983.

The annual average system cost estimates for Washington Water Power through 1986 are at or below the exchange rate determined from the Federal base system costs. Therefore, the exchange with Washington Water Power does not commence until after 1986 and the IOU base system resources and cost estimates do not include Washington Water Power until after 1986.

3. PA Base System. Estimates of public agencies own system resources dedicated to their load as given in the

1979 Long-Range Projection of Power Loads and Resources for Resource Planning, West Group Area (Blue Book), excluding WPPSS Nos. 4 and 5.

[2344] 4. Incremental New Resource Costs. The incremental cost of new resources for each sample year was established for effective interest rates on the capital portions of 7.0, 7.25, 7.50, and 9.0 percent, all at 100 percent debt financing. The effective interest costs were derived from a Lehman Bros., Kuhn Loeb study, dated November 1978. Despite the current high interest rates, we feel these interest rates are still applicable in the long term. The public agency financing costs with regional backup (not Federal guarantee) were estimated at 7.00 percent; without regional backup, but all public agency and cooperative backup, at 7.25 percent. The IOU financing cost at 100 percent debt with regional backup was estimated at 9.00 percent.

The 7.50 percent effective interest rate for IOU new resources in the base case was determined by 100 percent debt at 9.0 percent interest less $\frac{1}{3}$ of the possible investment tax credits and rapid depreciation allowances assuming a 46 percent tax rate. A similar result is obtained from 90 percent debt at 9.0 percent interest (could include preferred stock) and 10 percent equity at 18.25 percent interest with $\frac{1}{2}$ of the available tax benefits. No credit was given for lower capital costs resulting from possible IOU advantages in construction. The capital and O&M costs exclusive of financing is estimated here to be the same for both public and IOU plants.

For 1985, the incremental costs of new resources were based on renewable resources that have short construction lead times. We assume the cost of conservation will be less than or equal to renewable resource costs. Renewable resources are the most feasible types of new resources which can be on line by 1985 (lead times for development of conventional thermal would take too long). Therefore, estimates of incremental costs for a typical wind gener-

ator, a typical mill-residue plant and a typical wood-residue plant were made for each of the interest rate levels for 1985. The resulting incremental costs were determined by weighting each of the costs of the three types of plant by $33\frac{1}{3}$ percent. The incremental cost of new resources for 1981 was an assumed spot-market price.

Reliable estimates of the costs of developing renewable resources ten or fifteen years from now are not available. Therefore, for 1990 and 1995, we used the costs of conventional thermal resources assuming that incremental costs for development of renewable resources and conservation in those years are equal to or less than conventional thermal resource costs in those same years. This results in a higher incremental cost of new resources in 1985 than determined for 1990, due to renewable resource technology still being in the developmental stage in the mid-1980's. Estimates of incremental costs for a typical nuclear plant, a typical mine-mouth coal plant, and a typical coal plant located at load center were made for each of the interest rate levels for 1990 and 1995. The resulting incremental costs for each year were determined by weighting the costs of the three types of plant—50 percent nuclear, $33\frac{1}{3}$ percent coal-fired (mine-mouth) and $16\frac{2}{3}$ percent coal-fired (load center).

The average new resource costs which appear in the study cases are calculated by bringing on resources in the initial year they are needed at the incremental cost of new resources in that year. One-third of the incremental cost is assumed to be O&M including fuel expense. The O&M portion is escalated from the year the resource is brought online at the same implicit price deflators used in deriving the Federal base system costs and the incremental cost of new resources. Therefore, the average cost of new [2345] resources in any year is a weighted average of already installed new resources with O&M escalated up to the given year and any additional new resources needed

costed at the incremental cost of new resources for that year.

The ratio of PA new resource development to IOU new resource development is assumed to be proportional to PA load growth and IOU load growth. The DSI growth was assumed to be met from PA and IOU resource development in proportion to their respective growth rates, and to include the full amount of all conditional allowances for technological improvement processes (not plant expansion).

5. Reserves.

a. The value of reserves provided by the right to interrupt the DSI load was calculated for each year in the following manner (no attempt was made to treat energy and capacity reserves separately):

(1) The average megawatts of regional reserves being provided are normally considered to be one-half the DSI load. A more precise estimate is determined by taking one quartile of the DSI load plus whatever portion of the top quartile is assumed to be available in the given year.

(2) The average cost of each megawatt of reserves is estimated by determining the capital costs (no O&M) associated with all of the "new resources" that are in place in the given year and the total Federal Base System costs in that year.

(3) Applying the resultant average cost to the amount of reserves provided yields the total number of dollars associated with these reserves. The method described here does not establish the only way to evaluate the value of the reserves, but instead is an attempt to arrive at a reasonable estimate for purposes of this numerical analysis.

b. The amount of reserves applied to the preference customer rate limit computation is determined by:

(1) reducing the average cost of each megawatt of reserves by the ratio of the total rate limit load to the total program resources;

(2) reducing the megawatts of reserves provided by the DSIs by the percent DSIs within or adjacent to preference customers (85 percent assumed);

(3) applying the average cost to the number of reserve megawatts.

c. The amount of Reserve Adjustment credited to the DSIs under this study of the program is equal to one-half of the total value of the reserves. Thus approximately one-half of the savings to the region, in not building standby generation reserves, was credited to the DSIs for providing these reserves, and the remaining one-half was shared among the region's firm loads including 50 percent of the DSI load. The crediting of 50 percent of the value of the reserves to the DSIs does not set a precedent for future BPA rate cases. The form of availability credit or other reserve credit mechanism to be applied is not meant to be specified or prejudiced by the assumptions that are here.

[2346]

LOADS

6. IOU. Forecasts for both the domestic and rural loads as well as the commercial and industrial loads were provided by representatives of the IOUs. Loads shown are for both east group and west group utilities.

7. PA. Total load forecasts are taken from the 1979 Blue Book. Net requirements on BPA are derived by netting the PA base system resources from their total load.

8. FA. Forecasts taken from 1979 Blue Book.

9. DSI. Forecasts taken from 1979 Blue Book, and based on DSI contract entitlement, assuming full qualification for technological improvement allowances.

[2347]
REGIONAL PROGRAM STUDY CASE
79 DATA NEW PNUCC LOADS
CASE NO. 38

| | 1980-81 | | 1982-83 | | 1984-85 | | 1985-86 | | 1989-90 | | 1994-95 | |
|-------------------------------------|---------|-------|---------|-------|---------|-------|---------|-------|---------|-------|---------|-------|
| | MW | M/KWH | MW | M/KWH | MW | M/KWH | MW | M/KWH | MW | M/KWH | MW | M/KWH |
| 1. Regional Loads: | | | | | | | | | | | | |
| 2. Preference | | | | | | | | | | | | |
| Customers Total | 6,812 | | 7,383 | | 7,931 | | 8,284 | | 9,782 | | 11,954 | |
| 3. Own Resources | 2,098 | | 2,219 | | 2,368 | | 2,348 | | 2,377 | | 2,389 | |
| 4. Net Requirements | | | | | | | | | | | | |
| Federal Agencies | 4,714 | | 5,164 | | 5,563 | | 5,936 | | 7,405 | | 9,565 | |
| 5. IOU Total | 218 | | 240 | | 256 | | 266 | | 289 | | 310 | |
| 6. Own Resources | 7,463 | | 8,124 | | 8,814 | | 9,156 | | 11,712 | | 13,632 | |
| 7. Net Requirements | 7,463 | | 8,124 | | 8,124 | | 8,124 | | 9,086 | | 9,886 | |
| 8. IOU Res. & Fam. | 0 | | 0 | | 690 | | 1,032 | | 2,626 | | 4,546 | |
| Farm Irrigation | 3,359 | | 3,670 | | 3,986 | | 4,141 | | 5,319 | | 6,061 | |
| 10. DSI 75% | 2,601 | | 3,018 | | 3,077 | | 3,107 | | 3,227 | | 3,374 | |
| 11. 25% | 1,066 | | 1,058 | | 1,078 | | 1,088 | | 1,127 | | 1,176 | |
| 12. Total | 3,667 | | 4,076 | | 4,155 | | 4,195 | | 4,354 | | 4,550 | |
| 13. NEI Requirements on BPA | | | | | | | | | | | | |
| 14. Total | 8,599 | | 9,480 | | 10,664 | | 11,429 | | 14,674 | | 18,971 | |
| 15. W/O DSI 25% | 7,533 | | 8,422 | | 9,586 | | 10,341 | | 13,547 | | 17,795 | |
| 16. Preference Customer Rate Limit: | | | | | | | | | | | | |
| 17. Resources: | | | | | | | | | | | | |
| 18. Federal Base System | 8,049 | | 8,668 | | 9,351 | | 9,393 | 14.4 | 9,432 | 17.5 | 9,454 | 21.1 |
| 19. Additional Resources | 0 | | 201 | | 0 | | 375 | 84.2 | 1,963 | 83.2 | 4,289 | 101.3 |

REGIONAL PROGRAM STUDY CASE—(Continued)

79 DATA NEW PNUCC LOADS

CASE NO. 38

| | | 1980-81 | | 1982-83 | | 1984-85 | | 1985-86 | | 1989-90 | | 1994-95 | |
|-----|---|---------|-------|---------|-------|---------|-------|---------|-------|---------|-------|---------|-------|
| | | MW | M/KWH | MW | M/KWH | MW | M/KWH | MW | M/KWH | MW | M/KWH | MW | M/KWH |
| 20. | Reserve Costs | | | | | | | 2.5 | | 3.4 | | 4.1 | |
| 21. | Total | 8,049 | | 8,869 | | 9,351 | | 9,768 | 19.6 | 11,395 | 32.2 | 13,743 | 50.2 |
| 22. | Loads: | | | | | | | | | | | | |
| 23. | Pref. Customer Net Require- ments | 4,714 | | 5,164 | | 5,563 | | 5,936 | | 7,405 | | 9,565 | |
| 24. | Federal Agencies | 218 | | 240 | | 256 | | 266 | | 289 | | 310 | |
| 25. | 85% DSI | 3,117 | | 3,465 | | 3,532 | | 3,566 | | 3,701 | | 3,868 | |
| 26. | Total | 8,049 | | 8,869 | | 9,351 | | 9,768 | | 11,395 | | 13,743 | |
| 27. | Regional Rate: | | | | | | | | | | | | |
| 28. | Resources: | | | | | | | | | | | | |
| 29. | Federal Base System | 6,612 | 6.6 | 7,973 | 11.9 | 9,406 | 13.7 | 9,787 | 14.4 | 9,516 | 17.5 | 9,454 | 21.1 |
| 30. | IOU Exchange | 0 | | 0 | | 0 | | 556 | 25.7 | 3,497 | 38.9 | 6,061 | 59.2 |
| 31. | New Resources | 0 | | 0 | | 0 | | 0 | | 0 | | 421 | 100.2 |
| 32. | Revenue Adj. | | | | | | | | 1.5 | | 3.7 | | 4.0 |
| 33. | Reserve Adj. | | .5 | | .9 | | 1.0 | | 1.1 | | 1.5 | | 1.9 |
| 34. | Total | 6,612 | 7.1 | 7,973 | 12.8 | 9,406 | 14.7 | 10,343 | 17.7 | 13,013 | 28.5 | 15,936 | 43.5 |
| 35. | Loads: | | | | | | | | | | | | |
| 36. | Preference Rate Credits | | | | | | | | | | | | |
| 37. | Preference Customers | 4,714 | 7.1 | 5,164 | 12.8 | 5,563 | 14.7 | 5,936 | 17.7 | 7,405 | 28.5 | 9,565 | 43.5 |
| 38. | Federal Agencies | 218 | 7.1 | 240 | 12.8 | 256 | 14.7 | 266 | 17.7 | 289 | 28.5 | 310 | 43.5 |
| 39. | Preference Rate Adj. | | | | | | | | | | | | |

REGIONAL PROGRAM STUDY CASE—(Continued)

79 DATA NEW PNUCC LOADS

CASE NO. 38

| | 1980-81 | | 1982-83 | | 1984-85 | | 1985-86 | | 1989-90 | | 1994-95 | |
|---------------------------|---------|-------|---------|-------|---------|-------|---------|-------|---------|-------|---------|-------|
| | MW | M/KWH | MW | M/KWH | MW | M/KWH | MW | M/KWH | MW | M/KWH | MW | M/KWH |
| 40. IOU (Resid. & Irrig.) | 1,680 | 7.1 | 2,569 | 12.8 | 3,587 | 14.7 | 4,141 | 17.7 | 5,319 | 28.5 | 6,061 | 43.5 |
| [2348] | | | | | | | | | | | | |
| 41. New Resources Rate: | | | | | | | | | | | | |
| 42. Resources: | | | | | | | | | | | | |
| 43. Federal Base System | 1,508 | 6.6 | 695 | 11.9 | 180 | 13.7 | 0 | | 0 | | 0 | |
| 44. IOU Exchange | 1,680 | 18.4 | 2,569 | 20.4 | 3,587 | 23.3 | 3,585 | 25.7 | 1,822 | 38.9 | 0 | |
| 45. New Resources | 0 | 70.0 | 0 | 77.5 | 0 | 79.5 | 554 | 82.3 | 4,031 | 61.6 | 8,341 | 100.2 |
| 46. Total | 3,188 | 12.8 | 3,264 | 18.6 | 3,767 | 22.9 | 4,139 | 33.3 | 5,853 | 68.3 | 8,341 | 100.2 |
| 47. Loads: | | | | | | | | | | | | |
| 48. Regional Rate | 0 | | 0 | | 0 | | 0 | | 0 | | 421 | 100.2 |
| 49. Reserve Adj. | | .4 | | .6 | | .7 | | .8 | | 1.0 | | 1.3 |
| 50. DSI 75% | 2,601 | 13.2 | 3,018 | 19.2 | 3,077 | 23.5 | 3,107 | 34.0 | 3,227 | 69.4 | 3,374 | 101.4 |
| 51. Reserve Adj. | | .5 | | .9 | | 1.0 | | 1.1 | | 1.5 | | 1.9 |
| 52. Revenue Adj. | | | | | | | | 1.5 | | 3.7 | | 4.0 |
| 53. Pref. Rate Adj. | | | | | | | | | | | | |
| 54. IOU Load Growth | 0 | | 0 | | 690 | 23.9 | 1,032 | 35.9 | 2,626 | 73.6 | 4,546 | 106.0 |
| 55. Excess Resources | 587 | 13.3 | 246 | 19.5 | 0 | | 0 | | 0 | | 0 | |
| 56. Total | 3,188 | | 3,264 | | 3,767 | | 4,139 | | 5,853 | | 8,341 | |
| 57. IOU Exchange Rate: | | | | | | | | | | | | |
| 58. Base Resources | 7,463 | 18.4 | 8,124 | 20.4 | 8,124 | 23.3 | 8,124 | 24.4 | 9,086 | 28.9 | 9,086 | 35.7 |
| 59. New Resources Rate | 0 | | 0 | | 690 | 23.9 | 1,032 | 35.9 | 2,626 | 73.6 | 4,546 | 106.0 |
| 60. Total | 7,463 | 18.4 | 8,124 | 20.4 | 8,814 | 23.3 | 9,156 | 25.7 | 11,712 | 38.9 | 13,632 | 59.2 |

REGIONAL PROGRAM STUDY CASE—(Continued)

79 DATA NEW PNUCC LOADS

CASE NO. 38

| | 1980-81 | | 1982-83 | | 1984-85 | | 1985-86 | | 1989-90 | | 1994-95 | |
|------------------------------|---------|-------|---------|-------|---------|-------|---------|-------|---------|-------|---------|-------|
| | MW | M/KWH | MW | M/KWH | MW | M/KWH | MW | M/KWH | MW | M/KWH | MW | M/KWH |
| 61. DSI: | | | | | | | | | | | | |
| 62. Loads | 3,187 | 12.0 | 3,600 | 18.0 | 3,670 | 22.0 | 3,923 | 24.8 | 4,072 | 42.1 | 4,256 | 63.3 |
| 63. Reserve Credit | | -1.5 | | -2.6 | | -3.3 | | -3.9 | | -6.7 | | -10.0 |
| 64. Reserve Adj. | | .3 | | .5 | | .5 | | .6 | | .8 | | .9 |
| 65. Pref. Rate Adj. | | | | | | | | | | | | |
| 86. Net | 3,187 | 10.7 | 3,600 | 15.9 | 3,670 | 19.2 | 3,923 | 21.4 | 4,072 | 36.2 | 4,256 | 54.2 |
| 67. IRE | 480 | 87.5 | 476 | 96.9 | 465 | 99.4 | 272 | 102.9 | 282 | 102.0 | 294 | 125.2 |
| 68. Composite | 3,667 | 20.8 | 4,075 | 25.3 | 4,155 | 28.5 | 4,195 | 26.7 | 4,354 | 40.4 | 4,550 | 58.8 |
| 69. Summary: | | | | | | | | | | | | |
| 70. Pref. Cust. From Program | 4,714 | 7.1 | 5,164 | 12.8 | 5,563 | 14.7 | 5,936 | 17.7 | 7,405 | 28.5 | 9,565 | 43.5 |
| 71. Fed. Agency Cust. | 218 | 7.1 | 240 | 12.8 | 256 | 14.7 | 266 | 17.7 | 289 | 28.5 | 310 | 43.5 |
| 72. IOU (Resid. & Irrig.) | 3,359 | 12.8 | 3,670 | 15.1 | 3,986 | 15.5 | 4,141 | 17.7 | 5,319 | 28.5 | 6,061 | 43.5 |
| 73. IOU (Comm. & Ind.) | 4,104 | 18.4 | 4,454 | 20.4 | 4,828 | 23.3 | 5,015 | 25.7 | 6,393 | 38.9 | 7,571 | 59.2 |
| 74. IOU Composite | 7,463 | 15.9 | 8,124 | 18.0 | 8,814 | 19.8 | 9,156 | 22.1 | 11,712 | 34.2 | 13,632 | 52.2 |

[2349]

BASE DATA

| | 1980-81 | | 1982-83 | | 1984-85 | | 1985-86 | | 1989-90 | | 1994-95 | |
|---|---------|-------|---------|-------|---------|-------|---------|-------|---------|-------|---------|-------|
| | MW | M/KWH | MW | M/KWH | MW | M/KWH | MW | M/KWH | MW | M/KWH | MW | M/KWH |
| Resources: | | | | | | | | | | | | |
| Federal Base System | 8,120 | 6.6 | 8,668 | 11.9 | 9,586 | 13.7 | 9,787 | 14.4 | 9,516 | 17.5 | 9,454 | 21.1 |
| Secondary | 1,434 | | 1,561 | | 1,779 | | 2,070 | | 2,420 | | 2,420 | |
| IOU Base System | 7,463 | 18.4 | 8,124 | 20.4 | 8,124 | 23.3 | 8,124 | 24.4 | 9,086 | 28.9 | 9,086 | 35.7 |
| PA Base System | 2,068 | 3.3 | 2,219 | 3.4 | 2,368 | 3.6 | 2,348 | 3.7 | 2,377 | 4.0 | 2,389 | 4.6 |
| Incremental New Resource Cost (100 percent debt): | | | | | | | | | | | | |
| 7 percent | | 70 | | 76 | | 78 | | 80 | | 67 | | 99 |
| 7.25 percent | | 70 | | 77 | | 79 | | 82 | | 69 | | 101 |
| 7.50 percent | | 70 | | 79 | | 81 | | 84 | | 71 | | 103 |
| 9 percent | | 70 | | 83 | | 85 | | 88 | | 74 | | 109 |
| Value of Regional Reserves (millions) | | 83.4 | | 164.4 | | 209.6 | | 268.0 | | 479.6 | | 748.8 |
| Reserve Adjustment Credit to DSIs Under Program (\$ millions) | | 41.7 | | 82.2 | | 104.8 | | 134.0 | | 239.8 | | 374.4 |
| Loads: | | | | | | | | | | | | |
| PNUCC Loads: | | | | | | | | | | | | |
| IOU D+R | 3,359 | | 3,670 | | 3,986 | | 4,141 | | 5,319 | | 6,061 | |
| IOU C+I | 4,104 | | 4,454 | | 4,828 | | 5,015 | | 6,303 | | 7,571 | |
| IOU Total | 7,463 | | 8,124 | | 8,814 | | 9,156 | | 11,712 | | 13,632 | |
| PA—Total | 6,812 | | 7,383 | | 7,931 | | 8,284 | | 9,782 | | 11,064 | |
| PA Net Requirements | 4,714 | | 5,164 | | 5,563 | | 5,936 | | 7,405 | | 9,565 | |
| FA—Total | 218 | | 240 | | 256 | | 266 | | 289 | | 310 | |
| DSI 75% | 2,601 | | 3,018 | | 3,077 | | 3,107 | | 3,227 | | 3,374 | |
| DSI 25% | 1,066 | | 1,058 | | 1,078 | | 1,088 | | 1,127 | | 1,176 | |
| DSI Total | 3,667 | | 4,076 | | 4,155 | | 4,195 | | 4,354 | | 4,550 | |

[2350]

APPENDIX III

Senate Bill 885 allows BPA to restrict or withdraw substantial amounts of the DSI power supply in order to provide a portion of the region's power system reserves.

The new DSI contracts under the legislation will provide capacity reserves similar to those provided in the present contracts. Fifty percent of the then-operating DSI load may be restricted for a period of up to two hours to provide a forced outage or peaking power reserve. One hundred percent of the DSI load may be restricted by BPA for up to five minutes whenever frequency problems arise on the regional grid.

The DSIs will also provide two types of energy reserves. Approximately twenty-five percent of the DSI load is to be treated as a firm load for purposes of resource operation and will provide an operating reserve that may be restricted by BPA at any time in order to protect the Administrator's firm loads within the region and for any reason, including low or critical streamflow conditions and unanticipated growth of regional firm loads. An additional twenty-five percent of the DSI load will be treated as a firm load for both planning and operating purposes and will provide a planning reserve to protect the Administrator's firm loads against the delayed completion or unexpectedly poor performance of regional generating resources or conservation measures implemented or acquired by BPA.

Appendix J

CONGRESSIONAL RECORD—SENATE

November 19, 1980 (daily ed.)

Page S 14690

Mr. JACKSON. Mr. President, S. 885, the Pacific Northwest Electric Power Planning and Conservation Act, now pending before the Senate is the product of more than 5 years of public debate, hard work, and cooperation among a wide variety of regional interests and bipartisan congressional efforts to develop workable solutions to extremely complex utility planning problems. The bill before us is the result of a legislative process of consensus and compromise in which an effort has been made at every stage to accommodate the views of every interest group and every member of the Northwest delegation to the maximum extent possible. The Northwest power bill has been the subject of closer legislative scrutiny than any regional legislation in my memory. I believe that the bill has benefited at every stage of the legislative process from the careful attention which has been devoted to every detail and I am proud to be associated with the end product of this process.

. . .

. . . we are on the verge of a decade-long legal and administrative battle over the allocation of the large but limited pool of low-cost Federal power. Unless the allocation issue is resolved promptly through legislation, no utility will be able to dependably plan its future [S 14691] needs and power supply. The ultimate division of the limited Federal resource depends on unpredictable variables such as the outcome of the BPA allocation proceeding, legal challenges to that decision, new preference customer formations, and efforts by big industrial users to become customers of preference customers.

The only effective and workable way to resolve this dilemma is to expand the resource pool through BPA pur-

chase authority and to legislatively allocate its costs among customer groups. This eliminates the need to fight over a limited resource and the uncertainty about the outcome of that battle which prevents rational utility planning at present.

... In the absence of legislation resolving the allocation issue, the whole fabric of the utility industry and the Northwest economy will be in turmoil for a decade.

. . .

The rate provisions of the bill make it possible to immediately extend the economic benefits of low-cost Federal power to consumers served by investor-owned utilities; this is accomplished by raising rates to the aluminum companies. At the same time, preference customers rates are limited by a "rate ceiling" to no greater than what they would have been without the bill.

. . .

I would like to make one clarifying comment on the Senate report on S. 885. Due to a printing error the character of the direct service industry reserves was described in Senate Report 96-272 in a manner which caused some uncertainty and confusion. The DSI reserves were correctly described in the House Interior Committee report on S. 885 and as far as I am concerned that report accurately reflects the position of the Senate on this point.

[S 14698]

Mr. McCLURE:

. . .

I would also like to correct an error which was printed in the Senate report on S. 885 regarding direct service industry reserves. These reserves, discussed in section 5(d), are described accurately, and in some detail, in the House Interior Committee report and I direct attention to that report for its description of the reserves.

Appendix K

[6748]

**INDUSTRIAL CUSTOMERS [Letterhead]
of Bonneville Power Administration**

**Suite 464 Lloyd Building • 700 N.E. Multnomah Street
Portland, Oregon 97232
(503) 233-4445**

February 12, 1981

**TO: Don Franzwa (BPA)
Merrill Schultz (ICP)
Chip Greening (PPC)
Rob Marritz (PNUCC)**

FROM: Eric Redman

**RE: *BPA Obligations With Respect To The DSI Top
Quartile***

At the DSI contract negotiation session on Tuesday, February 10, a question was asked about the origin of the paragraph in Appendix B of the Senate Report (at page 59) describing the system operation contemplated to support treatment of the top quartile as a firm load for purposes of resource operation.

The attached excerpts from Bonneville's successive "Analysis of Rate Directives" (Fall 1978, February 1979 and July 1979) for S.3418 and S.885 show the development of the paragraph, including the changes that were made in it in response to suggestions from the publics, IOUs and DSIs. The "Analysis" was circulated in each draft to all BPA customers, and was also distributed at BPA's informational meetings on the legislation. The July 1979 "Analysis", after additional alterations at the request of each of the customer classes, is what was printed in the Senate Report as Appendix B.

[Appendix B, Senate Report, Aug. 1979]

[6749]

3. *Direct-Service Industry (see proposed amendment)*

a. *Rate Availability.* This rate applies to all "Industrial Firm" sales to BPA's direct-service industries which provide planning and operating reserves. The quantity of power for rate purposes is based on the proportion of the total industrial requirement, on a long-term average (currently estimated to be between 85 percent and 96 percent of the total DSI load), that BPA projects it will be able to serve directly. This projected availability is predicated on the continued planning and development of "firm" resources under critical stream-flow conditions to carry 75 percent of the total DSI requirements. The balance would be served with resources which are in excess of critical planning amounts but operated to meet the entire DSI load as if it were firm. The operation of the System to carry out this purpose results from treating as a firm load the maximum amount of the DSI load (not all of which can be covered under critical streamflow planning), to the extent that this maximum load can be met in the initial period of the PNW Coordination Agreement Critical Period while protecting firm loads against the worst historical streamflow and maintaining an ability to restrict an equivalent amount of the DSI Loads in the later periods (without provisional or advance energy being made available for this amount of the DSI load). Further, in actual operation DIS power withdrawn or curtailed in excess of interruptions for critical streamflows would be replaced by power purchased by BPA on a short-term basis, if available. The projected amounts estimated for the purposes of this analysis recognize the currently projected resource deficits. However, it assumes that by 1985 under the proposed legislation the System would be in load/resource balance.

. . .

Fall 1978

The greatest opportunity for a change in the prospective industrial firm sales is in operations affecting the predictable supply to the DSI load and in a corresponding increase in the reserves they provide. By treating the entire DSI load as a firm load, subject to interruption in favor of other firm loads in the region, the DSIs will receive service which is closer to full service under many more operating conditions than they do at present. The DSI load is uniquely able to be considered in this fashion because they can borrow on the expectation of better than critical streamflows or resource production, yet stand ready to curtail their loads beyond the normal reserve requirement in order to protect continued service to regional firm loads. The expected increase in industrial firm supply on a long-term average is from a present 75% industrial firm with 14% additional nonfirm sales to nearly 96% industrial firm service.

Feb., 1979

4. *Direct-Service Industry* (see proposed amendment)

a. *Rate Availability.* This rate applies to all "Industrial Firm" sales to BPA's direct-service industries providing planning and operating reserves. The amount of the sale is limited to the rate, calculated based on the proportion of the total industrial requirement, on a long-term average (currently estimated to be between 85% and 96% of the total DSI load), that BPA projects it will be able to serve directly. This projected availability is predicted on the continued planning and development of "firm" resources under critical streamflow conditions to carry 75% of the total DSI requirements. The balance would be served with resources which are in excess of critical planning amounts but operated to meet the entire DSI load as if it were firm.

July, 1979

3. *Direct-Service Industry* (see proposed amendment)

a. *Rate Availability.* This rate applies to all "Industrial Firm" sales to BPA's direct-service industries which provide planning and operating reserves. The quantity of power for rate purposes is based on the proportion of the total industrial requirement, on a long-term average (currently estimated to be between 85% and 96% of the total DSI load), that BPA projects it will be able to serve directly. This projected availability is predicated on the continued planning and development of "firm" resources under critical streamflow conditions to carry 75% of the total DSI requirements. The balance would be served with resources which are in excess of critical planning amounts but operated to meet the entire DSI load as if it were firm. The operation of the System to carry out this purpose results from treating as a firm load the maximum amount of the DSI load (not all of which can be covered under critical streamflow planning), to the extent that this maximum load can be met in the initial period of the PNW Coordination Agreement Critical Period while protecting firm loads against the worst historical streamflow and maintaining an ability to restrict an equivalent amount of the DSI Loads in the later periods (without provisional or advance energy being made available for this amount of the DSI load). Further, in actual operation DSI power withdrawn or curtailed in excess of interruptions for critical streamflows would be replaced by power purchased by BPA on a short-term basis, if available. The projected amounts estimated for the purposes of this analysis recognize the currently projected resource deficits. However, it assumes that by 1985 under the proposed legislation the System would be in load/resource balance.

Appendix L**CONGRESSIONAL RECORD—HOUSE**

November 17, 1980 (daily ed.)

Page H 10677

Mr. FOLEY. Mr. Speaker, I rise in strong support of S. 885. The issues of this bill have been debated in two of our major committees and two of the subcommittees of those committees.

This bill has been before the Congress for many years. It is essential to allocate Federal power in the Northwest, either by this legislation or by administrative action which will surely lead to a long decade of bitter litigation.

* * *

Mr. Speaker, like many of the other supporters of this legislation, my reasons for strongly urging the passage of the Northwest power bill are set forth in greater detail in the RECORD of September 29, 1980. But today, with final passage of S. 885 imminent, I want to emphasize a few important points.

This legislation is needed because of a Federal problem—the unavoidable need to reallocate Federal power sold by the Bonneville Power Administration (BPA). Because BPA's power supply is fixed in amount under present law, and because all that power is already allocated under contracts that begin expiring in May 1981, a reallocation of this power by some Federal entity cannot be avoided. The only issue is whether to carry out the necessary reallocation through Federal legislation, or to permit the reallocation to be carried out by a Federal administrative agency (BPA) and the Federal courts.

If any of the bill's supporters believed that an administrative and judicial reallocation could be carried out without severe disruption of the Northwest economy and

without harmful ripple effects that would be felt throughout the Nation, none of us—none of us—would have undertaken the incredibly arduous effort to pass this bill. But an administrative reallocation, litigated in the Federal [H 10678] courts for perhaps a decade, simply will not work. And this is what makes the legislation necessary.

. . .

But the simple fact is that until the allocation crisis is solved, the Northwest cannot move effectively, efficiently and in an environmentally sound manner to cure the impending power shortage, which by some estimates is now enormous. Because solving the shortage requires cooperation among dozens of diverse Northwest entities, and these entities cannot cooperate effectively so long as they are in court fighting one another on the issue basic to their survival, namely their power supply contracts.

It is said that this bill will not prevent litigation. That is certainly true. There may be litigation over rates, over new resources, and over the meaning of many provisions that have been added to the bill largely in order to reassure the bill's critics. But the key point is that litigation under this bill will not include litigation to determine the validity of each entity's new power supply contract.

On the contrary, by stating that BPA shall be "deemed" to have sufficient power to enter into all the 20-year power sales contracts mandated by the legislation, the bill specifically ensures that these new contracts will be valid against legal challenge. This provision does not "guarantee" actual power deliveries in day-to-day operation, but it does guarantee that whatever litigation occurs on power matters will not be litigation going to the heart of any BPA customer's power sales contract and power allocation—the most important single result of this legislation.

Appendix M

Cover Letter by
BPA Administrator
Offering New DSI Contracts

DEPARTMENT OF ENERGY [Letterhead]

Office of the Administrator
Bonneville Power Administration

P.O. Box 3621
Portland, Oregon 97208

In reply refer to: PCI
August 27, 1981

Dear Mr.

In response to your request to be offered the power sales contract under the Pacific Northwest Electric Power Planning and Conservation Act, this written offer is sent to you for your consideration.

The enclosed four copies of the initial long-term power sales contracts are the result of the negotiation process just completed. Please note that the Bonneville Power Administrator has already signed this contract. The signed contract constitutes a firm offer as required by the Regional Act. Your Company has one year from the date it receives this offer to accept it by signing and returning the contract to Bonneville.

. . .

This contract is the initial contract that Bonneville is required to offer each Industrial Purchaser pursuant to sections 5(d)(1)(B) and 5(g) of the Regional Act. As you know, the Act contemplates in section 5(d)(1)(B) additional, future contracts with each existing Industrial Purchaser, but unlike this initial contract, such future contracts do not have the benefit of the statutorily deemed sufficiency of power available to the Administrator under

section 5(g)(7). Bonneville's ability to offer any future contracts to its nonpreference customers, including the Industrial Purchasers, is therefore largely dependent upon Bonneville achieving firm load/resource balance while these initial contracts are in effect. Bonneville is aware that most, if not all, of the Industrial Purchasers are necessarily considering substantial new capital investment at their existing facilities during the period of the initial contracts, and that as a result the useful life of these facilities may be extended well beyond the 20-year term of the initial contracts. We hope you will find section 12 of the attached contract responsive to some of the concerns that have been expressed as to Bonneville's recognition of your need for future, as well as immediate, power planning certainty. We would certainly expect future Bonneville officials to recognize this need as well. At the same time, Bonneville's obligation to maintain load/resource balance through the efforts of its Customers and other non-Federal entities, and the goal of achieving load/resource balance in making possible future contracts and a continuing program under the Regional Act, needs to be borne in mind by the Customers as well as by Bonneville.

. . .

If your Company finds the provisions of the contract and the above condition acceptable, please have the appropriate officials sign this contract and the copy of this letter and fill in the execution date of the contract on page 2. Please return one copy of each document to Bonneville and keep remaining copies for your files.

M-3

Please contact our office if you have any questions.

Sincerely,

/s/ PETER T. JOHNSON
Administrator

Enclosures

Company

Executed by

Title

Appendix N

DSI Contract, (1975)

POWER SALES CONTRACT

executed by the

UNITED STATES OF AMERICA
DEPARTMENT OF THE INTERIOR

acting by and through the

BONNEVILLE POWER ADMINISTRATOR

and

KAISER ALUMINUM & CHEMICAL CORPORATION

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| 4. Sale of Power and Amount Sold | 3 |
| 5. Payment for Power Sold | 7 |
| 6. Provisions Relating to Delivery | 7 |
| 7. Use of Power | 8 |

. . .

[6278]

4. *Sale of Power and Amount Sold.*

(a) Subject to the other provisions of this contract, the Administrator shall make available to the Purchaser at the points of delivery hereinafter described, and the Purchaser shall purchase from the Administrator, Industrial Firm Power (as defined in section 1.4 of Exhibit B) in the following amounts for the respective periods indicated, which amounts shall constitute the Purchaser's contract demands for Industrial Firm Power for such periods:

(1) 665,100 kilowatts for the period between the effective date hereof and 2400 hours on August 31, 1977;

(2) 697,000 kilowatts for the period between 2400 hours on August 31, 1977, and 2400 hours on December 31, 1977;

(3) 707,000 kilowatts for the period between 2400 hours on December 31, 1977, and 2400 hours on December 31, 1979;

[6279]

(4) 708,300 kilowatts for the period between 2400 hours on December 31, 1979, and 2400 hours on June 30, 1980; and

(5) 715,100 kilowatts for the period between 2400 hours on June 30, 1980, and 2400 hours on December 31, 1994; *provided, however*, that 6800 kilowatts thereof, which are for Plant expansion, shall be subject to the provisions of subsection (b) below. [006279]

. . .

[6283]

7. *Use of Power.* The electric power and energy to be delivered to the Purchaser hereunder shall not be used by the Purchaser for purposes other than the production of aluminum and associated products, unless otherwise agreed to by the Administrator in an amendment to this contract. A breach of this section shall be deemed to be a material breach of this contract.

. . .

DSI RATE SCHEDULE—1975 CONTRACTS

[6285]

BONNEVILLE POWER ADMINISTRATION
UNITED STATES DEPARTMENT OF THE INTERIOR

SCHEDULE IF-1 WHOLESALE POWER RATE
FOR INDUSTRIAL FIRM POWER

(Effective December 20, 1974)

Section 1. AVAILABILITY:

This schedule is available for purchase of industrial firm power on a contract demand basis. This schedule is also available for purchase of an authorized increase of power on a contract demand basis.

Section 2. RATE:

The monthly rate for delivery of industrial firm power shall be as follows:

(a) For transmission system deliveries:

Demand charge: \$1.20 per kilowatt of billing demand

Energy charge: 1.525 mills per kilowatt-hour

(b) For at-site deliveries:

Demand charge: \$0.90 per kilowatt of billing demand

Energy charge: 1.525 mills per kilowatt-hour

Section 3. ADJUSTMENTS TO RATE:

The Administrator shall determine separately the annual availability of industrial firm power pursuant to section 1.4 and the availability of an authorized increase of power pursuant to section 1.5 of the General Rate Schedule Provisions. Based upon the annual availability of industrial firm power, the Administrator will credit the purchaser for that operating year from July 1 through June 30 an amount determined by multiplying the appropriate annual adjustment factor from the following table by one-twelfth the sum of the monthly billing demands in kilowatts for such operating year for industrial firm power prior to adjustment for

power factor. Based upon the availability of an authorized increase of power, the Administrator will credit the purchaser for that operating year an amount determined by multiplying the appropriate adjustment factor in the following table by one-twelfth the sum of the monthly billing demands in kilowatts for such operating year for such authorized increase prior to adjustment for power factor. Adjustment for the annual credits, if any, shall be made to the extent possible on the purchaser's June wholesale power bill. If the full credit cannot be effected on the June bill, the remaining credit will be given on subsequent bills. [6286] An appropriate adjustment will be made based on the availability calculated during the initial 6-month period of this rate schedule.

| <u>Annual Adjustment Factor</u> <u>dollars per kilowatt</u> | | <u>Annual Availability</u> <u>in percent</u> |
|--|---------------|---|
| | but less than | |
| 95 | 100 | 2.00 |
| 90 | 95 | 4.90 |
| 85 | 90 | 6.60 |
| 80 | 85 | 7.70 |
| 75 | 80 | 8.30 |
| 70 | 75 | 8.60 |
| under 70 | | 9.00 |

. . .

GENERAL CONTRACT PROVISIONS—
1975 DSI CONTRACT

[6305]

8. *Restriction of Deliveries.*

• • •

(b) The Administrator may at any time restrict deliveries of Industrial Firm Power in amounts up to one-fourth of the contract demand therefor. . . .

• • •

[6310]

10. *Determination of Availability.* The determination of the availability credit provided for in the contract and section 3 of Exhibit A shall include the following:

(a) If in any Contract Year the Administrator makes Advance Energy available pursuant to section 31(a) hereof, such energy up to an amount which, including the application of the Replacement Correction Factor, the Administrator determines the Purchaser can replace by curtailing deliveries to 25 percent of its contract demand [6311] for Industrial Firm Power over a period which in the Administrator's judgment is the minimum period in which such replacement may be effected, shall be deemed to be deliveries of Industrial Firm Power pursuant to the contract, and annual availability of and payment for Industrial Firm Power pursuant to the contract and rate schedule shall reflect such deliveries.

(b) The Administrator shall notify the Purchaser when the quantity of Advance Energy provided for in subsection (a) above has been made available. If the Administrator offers to make additional Advance Energy available, the Purchaser shall have the option of accepting or rejecting the additional Advance Energy in whole or in part. Only such additional Advance Energy as the Purchaser accepts shall be deemed to be Industrial Firm Power delivered pursuant to the contract and shall be reflected in the annual availability and payment determinations pursuant to the contract and rate schedule.

(c) If pursuant to section 31(f) hereof the Purchaser, by curtailing Plant operation, makes available Advance Replacement Energy, the kilowatt-hours so made available shall be deemed to be a restriction in deliveries of Industrial Firm Power by the Administrator for the Contract Year in which such replacement is made and the annual availability and payment for Industrial Firm Power pursuant to the contract shall be appropriately adjusted to reflect such restriction.

(d) If the Purchaser's Plant is shut down in whole or in part because of a curtailment pursuant to section 7 hereof or a restriction pursuant to section 8 hereof, either alone or in combination with the exercise of the Purchaser's option pursuant to sections 7(d) or 8(a) hereof, as the case may be, the annual availability of and payment for Industrial Firm Power pursuant to the contract and rate schedule shall be appropriately adjusted to reflect the daily average of the measured demands during the period covered by the schedule submitted pursuant to sections 7(e) or 8(h) hereof, as the case may be, in lieu of the full amount previously curtailed or restricted .

(e) The annual availability of and payment for Industrial Firm Power pursuant to the contract and rate schedule shall be appropriately adjusted to reflect any restriction which continues pursuant to section 8(g) hereof.

(f) If deliveries of electric power and energy to the Purchaser are suspended, interrupted, interfered with or curtailed due to Uncontrollable Forces, as defined in section 15 hereof, on either the Purchaser's works, system or facilities, the Federal System, or any Transferor's system, or if the Administrator or any Transferor interrupts or reduces deliveries to the Purchaser for any of the reasons stated in section 16 hereof (Continuity of Service), the annual availability of and payment for Industrial Firm Power pursuant to the contract and rate schedule shall be appropriately adjusted. No interruption of less than one hour

duration will be considered for computation of such adjustments.

(g) If the Administrator restricts deliveries of Industrial Firm Power pursuant to section 8 hereof in any circumstances for which appropriate adjustments in the determination of annual availability of and payment for Industrial Firm Power are not provided for in subsection (c), (d) or (e) of this section, the annual availability of and payment for Industrial Firm Power pursuant to the contract and the rate schedule shall be appropriately adjusted to reflect such restriction.

[6312]

(h) The Purchaser's annual availability in percent for each class of power eligible for availability credit shall be determined separately for such class pursuant to the following formula:

$$A = \frac{(\text{Kilowatt-hours requested} - \text{Kilowatt-hours restricted}) (100)}{\text{Kilowatt-hours requested}}$$

where

A=Purchaser's annual availability in percent for such class of power.

Kilowatt-hours requested=the sum of the products obtained by multiplying the number of hours in each month of the year by the lesser of the contract demand or the curtailed demand for such class of power for such month.

Kilowatt-hours restricted=the sum of the products obtained by multiplying the number of hours in each period or restriction (excluding restrictions pursuant to section 8(e)(3) hereof and restrictions of less than one hour's duration) during the year by the number of kilowatts restricted in such period of restriction.

Appendix O

**STATEMENT OF
JACK A. SPEER**

**BEFORE THE
U. S. HOUSE OF REPRESENTATIVES**

**COMMITTEE ON INTERIOR AND
INSULAR AFFAIRS SUBCOMMITTEE ON
WATER AND POWER RESOURCES**

**WASHINGTON, D. C.
SEPTEMBER 8, 1978**

Mr. Chairman and Members of the Committee, my name is Jack Speer. I am the Northwest Power Manager of the Aluminum Division of The Anaconda Company. Anaconda operates a primary aluminum smelter in Columbia Falls, Montana, which relies upon electrical power purchased as a direct service industry (DSI) from the Bonneville Power Administration.

I had the pleasure of addressing Senator Melcher on May 19, this year, in Billings at a hearing concerning S2080, and I am also pleased to be before you today to discuss HR13931. At the May hearing I pointed out a few important facts about the Northwest aluminum industry which I believe are worth keeping in mind. The Northwest aluminum industry has kept power costs down in several ways. By our ability to reduce our loads when needed to protect the quality of power supply to other regional consumers, the DSI's have provided energy and capacity reserves that have eliminated the need for the construction of costly standby generation. By our presence, we have allowed earlier construction and optional sizing of generation plants and transmission lines. We have purchased millions of dollars worth of interruptible energy which would have otherwise been unuseable,

thereby adding to BPA revenues and reducing the necessity of BPA collecting revenues from other classes of BPA customers. We have traditionally paid average costs for our power even though BPA's cost of serving our loads has been below average.

For continued overall regional welfare, the Northwest needs additional energy reserves to protect against the schedule slippage of new generating plants. These reserves could be provided by the replacement of existing DSI contracts with new contracts which provide more reserves.

. . .

I concluded my May 19 statement by urging prompt legislative action so that the electrical energy problems we see on the horizon today will not become hardships on the Northwest tomorrow.

The problems I was concerned about then still exist today. Forecasts are predicting electrical energy shortages and BPA is proceeding with an allocation of its insufficient resources despite the fact that the result will most certainly be challenged in court and not resolved for many years. The residential customers of the investor-owned utilities within the BPA service area still do not receive the same benefits of the Federal system as do their counterparts served by publicly owned systems and as a result pay rates that are higher. Existing public agencies are unable to plan for their future power supply because of the allocation uncertainties. The City of Portland has filed suit to gain access to BPA power. The DSI's, representing 30 percent of the U.S. aluminum reduction capacity as well as other important products, cannot make plans because of uncertainties of future power availability much less cost. And, while this is going on, loads are growing without the influence of strong conservation measures and new resource schedules slip while interested parties argue whether or not they should be built.

Unless regional action is taken soon, electrical energy shortages even more severe than now forecasted will most certainly result as loads continue to grow faster than resources.

Unless action is taken soon, the City of Portland's law suit and Oregon's Domestic and Rural Power Authority will draw the regions' energies toward fighting for available power in the legal arena instead of working together to see that loads and resources are planned and balanced for the over-all benefit of the Northwest.

Unless action is taken soon, BPA's Direct Service Industries such as my own Company, Anaconda, will have to make choices as to their future power supplies which most likely will result in the loss to the region of the reserves provided; also, law suits against BPA or other utilities if service is denied at reasonable rates and perhaps the forced closure of some industries with loss of jobs, economic base, tax revenues, production of needed materials and other social and economic benefits.

You may have heard that the Chinese ideogram for "crisis" is composed of the symbols for "danger" and "opportunity." The Northwest electrical energy situation is an impending crisis and I believe it has elements of both danger and opportunity. We face great danger if we do not solve our problems and balance our supply and demand for electrical energy, and at the same time we have the opportunity to create a system that will reduce the amount of new generation necessary while making adequate energy at reasonable costs available to meet our real needs.

But, if we fail to take prompt action, we will lose our opportunity because of the activities already underway which will make a legislative solution to these problems almost impossible. We will be left only with the danger.

The DSI's need an assured long-term power supply and one that is at a cost that allows us to be competitive with other North American and foreign producers.

. . .

HR13931 would give the DSI's some assurance of power supply. Under it, BPA would offer new long term contracts to us and would be mandated to see that loads and resources were balanced through:

- (1) Cost effective conservation
- (2) Acquiring other electrical power resources giving priority to high efficiency resources such as combined cycle and MHD.
- (3) Acquiring energy from waste heat, cogeneration or renewable resources.
- (4) Constructing renewable energy sources other than hydro.
- (5) Acquiring power from other entities to replace power interrupted by BPA.

This is the type of action necessary to give us the power assurance we and all other customers in the Northwest need, and at the same time give proper weight to our environment and avoid waste.

BPA's treatment of all our loads as firm except when interruptions are necessary to protect other firm loads will provide us with more useable energy, still protect firm loads and at the same time reduce spillage of valuable water.

. . .

Appendix P

**DEPARTMENT OF THE INTERIOR
(DES-77-21)**

DRAFT ENVIRONMENTAL STATEMENT

**The Role Of The Bonneville Power Administration
In The Pacific Northwest Power Supply System,
Including Its Participation
In The Hydro-Thermal Power Program:
A program Environmental Statement
and Planning Report**

**Appendix A
BPA Power Resources, Acquisitions,
Planning and Operations**

**Prepared By
Bonneville Power Administration
Department of the Interior
(July 22, 1977)**

**DONALD PAUL HODEL
Administrator**

. . .

The NWPP criteria require each member to maintain operating reserve on its system at all times. The amount of operating reserve each NWPP member system must maintain currently is equal to 5 percent of its hydro generation, plus 7 percent of the thermal generation it is using at the time to supply its load requirements. At least half of each system's operating reserve must be maintained as spinning reserve.

[excerpt from page II-71]

. . .

Appendix Q

Pub. L. 87-701 § 112(e)

(Sept. 26, 1962)

76 Stat. 604

. . .

Sec. 112

. . .

(e) The Commission shall not enter into any arrangements for the sale of byproduct energy from the Hanford New Production Reactor unless it determines that the purchaser has offered fifty per cent participation to private organizations and fifty per cent participation to public organizations on a non-discriminatory basis in the sale of electric energy generated therewith.

. . .

Appendix R

List of DSI Parents, Subsidiaries, and Affiliates

Alumax Pacific Corporation:

AMAX, Inc.
Mitsui & Co. Ltd.
Nippon Steel Corporation

Aluminum Company of America:

ALCOA.

ARCO Metals Company:

Atlantic Richfield Company (Arco)
ABE Beverage, Inc.
Alpart Forms (Jamaica), Ltd.
Alyeska Pipeline Service Company
Anaconda-Ericsson, Inc.
Anaflex, S.A. De C.V.
ARCO Australia Coal Pty., Ltd.
ARCO Solar Europe, Inc.
ARCO Solar Europe, S.p.A.
ARCO Solar Nigeria, Ltd.
Arlian, S.A. De C.V.
Arpet Petroleum Limited
Atlantic Richfield De Mexico, S.A. De C.V.
Badger Pipeline Company
Bingham Development Company
Black Lake Pipe Line Company
Blair Athol Coal Pty., Ltd.
The British American Metals Company, Ltd.
Candel International Limited
Caribou-Chaleur Bay Mines, Ltd.
Caribou-Smith Mines Ltd.
Centroamericana De Cobre, S.A.
Chile Copper Company
Cobre De Hercules, S.A.
Cobre De Mexico, S.A.

Cobrecel, S.A. De C.V.
 Colonial Pipeline Company
 Compania De Petróleo Ganso Azul, Ltda.
 Compania Minera de Cananea, S.A.
 Compania Minera Don Ricardo, S.A. de C.V.
 Compania Minera Dos Republicas, S.A. de C.V.
 Compania Minera Kappa, S.A.
 Companie Minera Penacobre, S.A.
 Cook Inlet Pipe Line Company
 Cupro San Luis, S.A. de C.V.
 Defender Mining and Milling Corp.
 Delaware Bay Transportation Company
 Dexter de Mexico, S.A.
 Dixie Pipeline Company
 Dragon Consolidated Mining Company
 East Texas Salt Water Disposal Company
 85819 Canada Limited
 Empresas de Comercio Exterior Mexicano, S.A. de C.V.
 Energy Transportation Systems, Inc.
 F.T.L. Company Limited
 Gravity Adjustment, Inc.
 Greater Pacific Limited
 Hardy Oil Company
 Imperial Eastman de Mexico, S.A.
 Impulsora de Cobre, S.A. De C.V.
 Industrias Nacobre, S.A. De C.V.
 Industrias Tecnos, S.A. De C.V.
 Iricon Agency, Ltd.
 Jamaica Aluminum Security Company, Ltd.
 Kenai Pipe Line Company
 Kronos Computacion Y Teleproceso, S.A. De C.V.
 Las Quintas Serenas Water Company
 Lavan Petroleum Company
 Lingobronce, S.A.
 Manguera Felix, S.A. De C.V.
 Manufacturera Mexicana De Partes Para Automoviles,
 S.A. De C.V.
 Mayflower Mining Company

Middle Swansea Mining Company
R.W. Miller (Holdings) Limited
Mineracao Anaconda Brasil Ltda.
Montoro, Empersa Para La Industria Quimica, S.A.
Nacional De Cobre, S.A.
New Bingham Mary Mining Company
Nihon Oxirane Company, Ltd.
Nordisk Mineselskab A/S
North Lilly Mining Company
Oil Shippers Service, Inc.
P.T. Arutmin Indonesia
Park Cummings Mining Company
Park Premier Mining Company
Participaciones Mexicanas, S.A. De C.V.
Patten Mining Company
Platte Pipe Line Company
Prince Consolidated Mining Company
Productos Especiales Metalicos, S.A.
Richfield U.K. Petroleum, Limited
Rodman, Inc.
The Saudi Cable Company
Servicios Industriales Nacobre, S.A. De C.V.
Sinclair Venezuelan Oil Company
Smoke House Copper Mining Company
Sociedade Anonima Marvin
Solvamex, S.A. De C.V.
Swecomex, S.A.
Tecumseh Pipe Line Company
Trans-New Mexico Pipe Line Company
Trans Mountain Oil Pipe Line Company Ltd.
Tubos Flexibles, S.A.
Union de Credito Industrial Vallejo, S.A.
United Park City Mines Company
The Walworth Company
West Mayflower Mining Company
William Prym de Mexico, S.A.

The Carborundum Company:

Kennecott Corporation, a wholly-owned subsidiary of
Standard Oil Company of Ohio

Crown Zellerbach:

None listed

Georgia-Pacific Corporation:

Compania de Navegacion Arboreous, S.A.
P.T. Georgia-Pacific Indonesia
P.T. Kalimanis-Plywood Industries
Thacker Land Company

Hanna Nickel Smelting Company:

Hanna Mining Co.

Intalco Aluminum Corporation:

AMAX, Inc.
Howmet Aluminum Corporation
Howmet Corporation
Mitsui & Co. Ltd.
Nippon Steel Corporation
Pechiney Ugine Kuhlman
Pechiney Ugine Kuhlman Corporation

Kaiser Aluminum & Chemical Corporation:

Alpart Farms (Jamaica), Ltd.
Aluminium Bahrain
Aluminium Products Company Limited
Anglesey Aluminium Limited
Bauxita Da Amazonia Limitada
Boyne Smelters Limited
Ethiopian Potash Private Limited Company
Grundstucksverwaltungs Gesellschaft Objekt
Wallerstheim MBH
Hindustan Aluminium Corporation Limited
Hopewell International Company Limited
Jamaica Alumina Security Company, Ltd.

Kaiser Alluminio Italia S.R.L.
 Kaiser Aluminium Bahrain E.C.
 Kaiser Aluminium Huttenwerk GMBH
 Kaiser Aluminium Kabelwerk GMBH
 Kaiser-Teleprompter of Hawaii, Inc.
 Mineracao Do Jutai Limitada
 Mineracao Do Matapi Limitada
 Mineracao Do Prainha Limitada
 Oakland City Center Hotel Company, Inc.
 Phenix Aluminium Societe Anonyme
 Queensland Alumina Finance N.V.
 Queensland Alumina Holdings N.V.
 Queensland Alumina Limited
 Queensland Alumina Security Corporation
 Second Queensland Alumina Security Corporation
 Societe D'Etudes Des Bauxites Du Cameroun
 Societe Industrielle Phenix Aluminium S.A.
 Thai Metal Works Company, Ltd.
 Volta Aluminium Company Limited

Martin Marietta Aluminum Inc.:

Allied Corporation
 Champlin Petroleum Company, a wholly-owned
 subsidiary of Union Pacific Railroad Corporation
 Martin Marietta Corporation

Oregon Metalurgical Corporation:

Armco, Middletown, OH.

Pacific Carbide & Alloys:

None listed

The Pennwalt Corporation:

Centrifugas Peruanas, SA
 Decco-Roda, SpA
 Electroquimica Pennwalt, SA
 Industria Chimica del Ticino SpA
 Industria Chimica di Termoli, SpA

Industria Quimica Pennwalt, SA
 Japan Thiochemical Co., Ltd.
 Lucidol Yoshitomi, Ltd.
 MAIA, SpA
 Nitrogeno Industrial Y Alimenticio, SA
 Pennwalt Del Pacifico, SA
 Pennwalt, SA de C.V.
 Pennwalt Venezolana, CA
 Petroquimica Pennwalt, SA
 Quimetal, SA
 Quimica Pennwalt, SA
 Waltiernan Dormas (Pty), Ltd.
 Pan-Lux, SpA
 Pennwalt India, Ltd.

Reynolds Metals Company:

Alpart Farms (Jamaica), Ltd.
 Alumina Partners of Jamaica
 Altenwerder Hutten-Uad Walzwerk GnoH
 Aluminio del Caroni, S.A.
 Aluminio Reynolds del Peru Sociedad Anonima
 Aluminio Reynolds, S.A.
 Aluminio Reynolds, Santo Domingo S.A.
 Aluminium Oxid Stade Gesellschaft mit heschränkter
 Haftung
 Aluminium Corporation of the Philippines
 Association Venezolana de Adiestramiento y
 Desarrollo del Aluminio (AVADAL) (AC)
 Barrstone Associates—Partnership
 Bennett Manor Associates—Partnership
 Bushnell Plaza Apartments—Partnership
 Bushnell Plaza Development Corporation—
 Partnership
 Cathedral Square Associates—Partnership
 Cathedral Square Associates II—Partnership
 Chace Investors Joint Venture (AC)
 City Venture Corporation

Crown Oak Associates, Limited—Partnership
 Curtis Apartment Associates—Limited Partnership
 Cypress Court Associates—Limited Partnership
 Eastwick Joint Venture (AC)
 Eastwick Joint Venture II—Limited Partnership
 Eastwick Joint Venture III—Limited Partnership
 Eastwick Joint Venture IV—Limited Partnership
 Eskimo Europ, S.a.r.l.
 Eskimo Pie Corp.
 Egyptian Aluminum Products Co.
 Gas Natural Columbiano, S.A.
 Hamburger Aluminum—Werk Gesellschaft mit
 beschränkter Haftung
 Industria Navarra del Aluminio, S.A.
 Jamaica Alumina Security Company, Ltd. (AC)
 Jamaica Reynolds Bauxite Partners (AC)
 Lomer Development Corp.
 Lynx—Canada Exploration Ltd.
 Madison Manor—Partnership (AC)
 Manicougan Power Company (AC)
 Midtown Associates—Partnership
 Mill Pond Development Corp.—Partnership
 Mill Pond Tower Associates—Partnership
 Minas do Dragao Ltda.
 Mineracao Sao Jorge Ltda.
 Mineracao de Bauxita Ltda.
 Minerais de Aluminio Ltda.
 National Housing Partnership
 New Eastwick Corporation
 Oceanside Estates Associates—Partnership
 Omnia Minerios Ltd.
 Phillips—C.B.A. Conductors Limited
 Presidential Development Corp.
 Presidential Plaza Associates
 Presidential Plaza Corp.
 Presidential Plaza Investors
 Puerto de Hierro, Sociedad Anomina (AC)

Rayburn Manor Associates—Partnership
Regency Joint Venture
Regency Joint Venture II
Regency West Associates—Partnership
Reynolds Aluminio, Sociedad Anonima
Reynolds Aluminum (Thailand) Co. Ltd. (AC)
Reynolds Aluminum Company of Canada
Reynolds Gilbane—Weybosset Joint Venture
Reynolds Philippine Corporation
Iranian Aluminum Co.
Reywest Development Corporation
Robertshaw Controls Co.
S.L.I.M.
Superenvases Envalic, C.A.
Titusville Manor Corporation—Partnership
UNCO, S.A. (AC)
Union Industrial y Astilleros Bananquilla Unial S.A.
Valesol Aluminio S.A.
Volta Aluminum Co. Ltd.
Westeel International Ltd. (AC)
Weybosset Hill Development Corp.
Worsley Alumina Pty. Ltd.
Worsley Joint Venture

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1983

ALUMINUM COMPANY OF AMERICA, et al.,
Petitioners,

v.

CENTRAL LINCOLN PEOPLES' UTILITY DISTRICT, et al.,
Respondents,
and

PETER JOHNSON, as Administrator of the BONNEVILLE
POWER ADMINISTRATION, Department of Energy,
and DONALD PAUL HODEL, as Secretary of the
DEPARTMENT OF ENERGY, and the
UNITED STATES OF AMERICA,
Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

JOINT APPENDIX

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APPEAL DOCKETED DECEMBER 22, 1982
PROBABLE JURISDICTION NOTED MARCH 28, 1983



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| 4. Second Amended Complaint, filed November 2, 1981 | 22 |
| 5. BPA, Final Environmental Impact Statement, the Role of the Bonneville Power Administration in the Pacific Northwest Power Supply System (DOE/EIS-0066) (12/80), Exhibit B to Preference Customer Memorandum, filed November 2, 1981), title page, pages IV-71, IV-80, IV-85, and IV-86 | 28 |
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The following documents have been omitted in printing this appendix because they appear in the appendix to the printed Petition for Certiorari:

- Appendix A Opinion and Judgment of the Ninth Circuit
(attached to Petition)
- Appendix H DSI Contract (1981) Sections 7(c), 7(d), 14
- Appendix I Letter of BPA Administrator to Hon. Abraham B. Kazen (Aug. 19, 1980)
- Appendix K Memorandum regarding "BPA Obligations
With Respect to DSI Top Quartile" (Feb.
12, 1981)
- Appendix N DSI Contract (1975) Sections 4, 7, General
Contract Provisions, Section 8(b)

Docket Entry No. 81-7561

United States Court of Appeals
For the Ninth Circuit

Petition for Review

Oregon (Portland)

Central Lincoln Peoples' Utility District; City of Eugene,
By the Eugene Water & Electric Board; et al.,
Petitioners,

vs.

Peter Johnson, as Administrator of the Bonneville Power
Administration, Dept. of Energy, James Edwards, as
Secretary of the Dept. of Energy, and the U.S.A.
Respondents.

Public Power Council, et al,
Intervenors.

Related to: 81-7618, 81-7622, 81-7621,
81-7629, 81-7632, 81-7633, 81-7635/36/37

For Petitioner:

Jay T. Waldron, Esq. of Schwabe, Williamson, Wyatt,
Moore & Roberts
Ph: 503/222-9981

For Respondent:

Peter Johnson, (Bonneville Power)
Sidney Lezak, U.A. Attorney
James Edwards, Secretary of Energy

DateFILINGS-PROCEEDINGS**1981**

- Aug 31 Paid fee. -vt-
- Aug 31 Filed orig & three petition for review of an order
 of the Dept. of Energy, et al., (Civatt)
- Aug 31 Filed motion for temporary injunction and for
 order to show cause with exh's. (Civatt)
 -vt-
- Aug 31 Docketed cause & entd appearance of counsel.
 -vt-
- Aug 31 Notified counsel for the respondent & issued
 copies. -vt-
- Sep 8 Filed (Public Power Council) motion for leave
 to intervene. (Civatt) -vt-
- Sep 9 Filed, as of Sep 8, respondents' memorandum in
 opposition to motion for temporary injunction
 or stay pending review. (Civatt) 9/4 -dmf-
- Sep 9 Filed petitioners' memorandum in response to
 questions by court on injunctive relief issues
 and suppl. brief. (Civatt) 9/8 -dmf-
- Sep 9 Filed affidavits of Peter T. Johnson, et al, in sup-
 port of respondents' opposition to motion for
 temporary injunction. (Civatt) 9/8 -dmf-
- Sep 9 Filed, as of Sep 8, motion (Direct-Service Indus-
 trial Customers) to intervene. (Civatt) 9/4
 -dmf-
- Sep 11 Filed, as of Sep 10, order (Goodwin, Skopil) the
 motion of the Public Power Council to inter-
 vene as plaintiff and the motions of Aluminum
 Company of America, et al, to intervene as de-
 fendants are granted. Petnrs' request for stay
 pending review is denied. Requests for expedi-
 tion are granted. The parties shall adhere to
 the following schedule: a) the admin record

DateFILINGS-PROCEEDINGS

shall be filed by September 24, 1981. b) Plaintiffs and plaintiff-intervenors shall file their opening briefs on or before October 1, 1981. c) Defendants and defendant-intervenors shall file their answering briefs on or before October 8, 1981. d) Plaintiffs and plaintiff-intervenors may file their reply briefs on or before October 14, 1981. e) no ext of time to his briefing schedule will be granted, absent extraordinary circumstances. Any objections to the briefing schedule contained in this order shall be filed with the Court on or before September 15, 1981. f) all further documents shall be filed in the Clerk's Office in San Francisco, except that any objections to the briefing schedule shall also be filed in the chambers of Judges Goodwin and Skopil. The Clerk shall attempt to calendar this case in November, 1981 before a regular panel of the Court. -dmf-

- Sep 11 Rec'd, as of Sep 10, witness statements of Donald E. Long, Gerald R. Garman and Eugene W. Lubking. (panel & Civatt). -dmf-
- Sep 11 Rec'd, as of Sep 10, reply memorandum of Direct Service Industries, affidavit of Bruce E. Mizer and DSI Answers to Court Questions. (panel & Civatt) -dmf-
- Sep 18 Filed as of Sep 14 four copies of brief of Amicus Curiae (State of Oregon). 9/9 -dmf-
- Sep 18 Filed, as of Sep 16, plaintiff-intervenor's objection to briefing schedule. (copy to Civatt) 9/15 -dmf-
- Sep 18 Filed, as of Sep 16, plaintiff's objection to briefing schedule. (copy to Civatt) 9/15 -dmf-

DateFILINGS-PROCEEDINGS

- Sep 18 Filed, as of Sep 17, motion (Pudget Sound Power & Light Company) for leave to intervene. (copy to Civatt) 9/15 -dmf-
- Sep 18 Filed, as of Sep 17, motion (Portland General Electric) for leave to intervene. (copy to Civatt) -dmf-
- Sep 18 Filed, as of Sep 16, order (Goodwin, Skopil) 1) the motions of Portland General Electric Company and Puget Sound Power & Light Company to intervene as plaintiffs are granted. 2) Upon due consideration of the documents rec'd by 9/15/81, objecting to the briefing schedule set in order of 9/10/81, the briefing schedule is hereby modified. The parties shall adhere to the following schedule: a) the admin. record shall be filed by September 24, 1981. b) Objections and request to suppl. the record shall be filed by October 9, 1981. c) plaintiffs and plaintiff-intervenors shall file their opening briefs on or before October 30, 1981. d) Defendants and defendant-intervenors shall file their answering briefs on or before November 13, 1981. e) Plaintiffs and plaintiff-intervenors may file their reply briefs on or before November 20, 1981. f) No extensions of time to this briefing schedule shall be granted, absent extraordinary circumstances. 3) the Clerk shall attempt to calendar this case in January, 1982 before a regular panel of the court. -dmf-
- Sep 21 Filed motion (Direct Service Industrial Customers) to reconsider. (Civatt) 9/17 -dmf-
- Sep 21 Filed respondent's request for consideration of order granting leave to intervene. (Civatt) 9/17 -dmf-

| <u>Date</u> | <u>FILINGS-PROCEEDINGS</u> |
|-------------|---|
| Sep 21 | Filed petnrs' memorandum in opposition to rspdt's request for reconsideration. (Civatt) 9/18 -dmf- |
| Sep 21 | Filed petitioners' motion for joinder for Elkem Metals Company. (Civatt) -dmf- |
| Sep 21 | Filed petitioners' motion for joinder for Stauffer Chemical Company. (Civatt) -dmf- |
| Sep 21 | Filed petitioners' statement of joinder. Civatt) 9/21 -dmf- |
| Sep 21 | Filed petnrs' amendments to original complaint. (Civatt) 9/21 -dmf- |
| Sep 21 | Filed respondents' request for consideration of order granting petnrs' objections to briefing schedule. (Civatt) -dmf- |
| Sep 22 | Filed, as of Sep 21, order (Goodwin, Skopil) the government's motion of September 17, 1981 and the direct service industrial customers' motion of September 17, 1981 seeking reconsideration of the court's order of September 10, 1981 are denied. -dmf- |
| Sep 23 | Rec'd letter dated 9/22/81 from petitioner counsel requesting that case be heard in Portland, Oregon. (Civatt, Calatt) -dmf- |
| Sep 24 | Filed Cert. Inventory of the Official Record, Orig. only. (to Civatt w/three boxes of attachments.) -dmf- |
| Sep 28 | Filed motion (Stauffer Chemical Co. and Elkem Metals Co.) to intervene as defendants. (Civatt) 9/25 -dmf- |
| Sep 28 | Filed motion (Kaiser Aluminum & Chemical Corp.) for correction of corporate name. (Civatt) 9/25 -dmf- |
| Sep 28 | Filed motion (CP National Corp.) for leave to intervene. (Civatt) 9/25 -dmf- |

| <u>Date</u> | <u>FILINGS-PROCEEDINGS</u> |
|-------------|---|
| Sep 28 | Filed motion (Montana Power Co.) for leave to intervene. (Civatt) -dmf- |
| Sep 28 | Filed motion (Idaho Power Company) for leave to intervene. (Civatt) 9/29 -dmf- |
| Sep 30 | Filed motion (Pacific Power & Light Company) for leave to intervene. (Civatt) 9/29 -dmf- |
| Oct 5 | Filed, as of Oct 2, order (Goodwin, Skopil) a) the motion of Kaiser Aluminum & Chemical Corp. for correction of corporate name is granted; b) Stauffer Chemical Co. and Elkem Metals Co. are granted leave to intervene as defendants. Motion for joinder is denied as moot; c) CP National Corp., Montana Power Company, Idaho Power Company and Pacific Power & Light Company are granted leave to intervene as plaintiffs; d) intervenors shall file their briefs in accordance with the briefing schedule set forth in the court's order of September 16, 1981; and e) the clerk shall attempt to calendar this matter for hearing in Portland, Oregon. -dmf- |
| Oct 7 | Filed respondents' motion to quash petnr's request for production of documents. (Civatt w/attachment) 10/5 -dmf- |
| Oct 9 | Filed intervenor's (Public Power Council) motion for ext of time for objections to and requests for supplementation of the admin. record. (Civatt) 10/8 -dmf- |
| Oct 13 | Filed intervenors' (PG&E, et al) motion for ext of time for objections to and requests form supplementation of the admin. record. (Civatt) 10/9 -dmf- |
| Oct 13 | Filed petnrs' objection to record and request for supplementation. (Civatt) 10/9 -dmf- |

| <u>Date</u> | <u>FILINGS-PROCEEDINGS</u> |
|-------------|---|
| Oct 19 | Filed respondents' memorandum in opposition to intervenors' motions for ext of time. (Civatt) 10/16 -dmf- |
| Oct 21 | Filed respondents' memorandum in opposition to petnrs' request to suppl. the record. (Civatt) 10/18 -dmf- |
| Oct 21 | Filed intervenors' memorandum opposing petnrs' requested relief and supporting govt.'s motion to quash. (Civatt) 10/19 -dmf- |
| Oct 22 | Filed intervenors response to motion to quash. -ho (Civatt) 10/20 |
| Oct 23 | Filed order (Goodwin, Skopil) 1) intervenors may file objections to and requests for supplementation of the record on or before 7 days from the entry of this order. 2) intervenors motion for ext of time to respond to the govt's motion to quash is granted and the response heretofore rec'd is ordered filed. 3) The govt's motion to quash is granted in part and denied in part. 4) Public Power Council's motion to ext the briefing schedule is denied. The parties shall adhere to the briefing scheduled established in our order of September 16, 1981. -dmf- |
| Nov 2 | Rec'd ltr dated 10/30/81 from plft/intervenor re filing an answering or reply brief. (Civatt) -vt- |
| Nov 2 | Filed public Power Council adoption of Central Lincoln Peoples brief. ***** -vt- |
| Nov 2 | Filed plft/intervenor motion for leave to file second amended complaint. (Civatt) |
| Nov 2 | Rec'd Plft/intervenors second amended complaint. (Civatt) -vt- |
| Nov 2 | Filed orig only of preference customer memorandum. (Civatt) -vt- |

| <u>Date</u> | <u>FILINGS-PROCEEDINGS</u> |
|-------------|---|
| Nov 2 | Filed (PG&E) Motion to suppl. record with suppl attached. (Civatt) -vt- |
| Nov 2 | Filed (PG&E) orig & 6 copies of the brief. |
| Nov 2 | Filed petrs resp response to order directing production of documents. (Civatt) -vt- |
| Nov 4 | Rec'd (PG&E) suppl Appendix to record. -vt- *** |
| Nov 4 | Filed resp (Bonneville Power) In Camera Inspection of Privileged Documents in two vol. & two copies each. (Civatt) -vt- |
| Nov 4 | Rec'd ltr dated 10/30/81 from Bonneville re errors in privileged documents. (Civatt) |
| Nov 6 | Filed resp (Bonneville) memorandum opposing petr/intervenor motion regarding supplementation of and deletions from the contract official records. (Civatt) -vt- |
| Nov 12 | Field (Portland General) supplemental memorandum re: deletions from record. Calendared Portland (Civatt) -vt- |
| Nov 13 | Recvd from Portland Gen. Elec. 7 add'l copies of Opening Brief of Plaintiff-Intervenors Investor-Owned Utilities filed Nov. 2, 1981, and 7 add'l copies Submission re Supplementation of and Deletions from the Record, filed Nov. 2, 1981. -mlm- |
| Nov 16 | Rec'd add'l 8 copies of pet's Preference Customer Memorandum filed Nov. 2, 1981. -mlm- |
| Nov 16 | Rec'd add'l 7 copies of brief of Amicus Curiae (State of Oregon) filed Sept. 14, 1981. -mlm- |
| Nov 16 | Filed orig & 15 copies of resp-intervenors answering brief (48pp.) (11/13), to panel. ck |
| Nov 17 | Filed, as of 11/6/81, Order (Goodwin & Skopil) (1) Pltfs' motion for leave to file a second amended complaint is granted, and the second amended complaint, heretofore rec'd, is |

DateFILINGS-PROCEEDINGS

ordered filed. (2) Upon consideration of pltf-intervenor investor owned utilities' motion regarding supplementation of and deletions from the official record and the gov'ts opposition (a) the four documents, exhibits C-F of pltf-intervenors' request, are ordered added to the record and (b) pltf-intervenor investor owned utilities' request to delete certain material from the record is referred to the panel that hears this case on the merits. (3) The index and documents submitted to this court for *in camera* inspection to determine claims of privilege are insufficiently marked to enable this court to rule on the claims. BPA is hereby ordered to provide an adequate index, to mark each document so it can be located via the index, to mark the section for each document for which a privilege is claimed, and to give supporting reasons for each claim of privilege. This material shall be filed no later than November 13, 1981. (4) Pltfs' motion to compel production is referred to the merits panel. (5) All opening briefs, heretofore rec'd, are ordered filed. The merits panel may request add'l copies of briefs. ck

- Nov 17 Filed, as of 11/6/81, pltfs' second amended complaint. ck
- Nov 18 as of 11/9/81 Filed (Central Lincoln) motion to compel production. (Civatt) -vt-
- Nov 18 as of 11/12/81 Filed resp motion for ext of time to reply to motion to compel. (Civatt)
- Nov 18 as of 11/17/81. Filed (Bonneville Power) answering brief with attachments. (50p) (panel) -vt-

| <u>Date</u> | <u>FILINGS-PROCEEDINGS</u> |
|-------------|---|
| Nov 19 | Filed, as of 11/17/81, Order (Goodwin & Skopil) Respondents are granted an ext. of time until November 20, 1981 in which to respond to petitioners' motion to compel production and to file a revised index for privileged materials. ck |
| Nov 23 | Rec'd, as of 11/19/81, letter dated 11/16/81 from Thomas C. Lee, AUSA, re: delay in delivery of brief due to postal service problems. ck |
| Nov 23 | Filed orig & 3 copies of reply memorandum of preference customer, to panel. 11/20/81 ck |
| Nov 23 | Filed petnrs' motion to supplement the record with memorandum of Bernard Goldhammer and affidavit of Gerald R. Garman, with attached copies of said documents, to panel. 11/20/81 ck |
| Nov 23 | Filed resps' (USA, et al.) memorandum in sup- port of claims of privilege and in opposition to motion to compel production, to panel. 11/ 20/81 ck |
| Nov 23 | Filed 3 sets of revised compilation of documents for which privileges are claimed, to Civatt. (panel notified that documents available) ck |
| Nov 25 | Filed, as of 11/23/81, orig & 15 copies of pltfs/ intervenors-owned utilities reply brief, to panel. (15 pp) (11/20) ck (copies also to Civatt) |
| Nov 25 | Filed pltf/intervenors investor-owned utilities motion for an order excluding certain claims, to panel and Civatt. 11/25/81 ck |
| Nov 30 | Rec'd letter dated 11/25/81; from Jay T. Wal- dron, re: complete copy of the Bernard Gold- hammer Memorandum attached to pltfs' mo- tion, to panel and Civatt. 11/25/81 ck |

| <u>Date</u> | <u>FILINGS-PROCEEDINGS</u> |
|-------------|--|
| Nov 30 | Filed motion of pltfs' to permit filing of substitute pages for three of the pages in pltfs' preference customer reply memorandum, to panel and Civatt. 11/25/81 ck |
| Dec 2 | Filed resp/intervenors memorandum in opposition to petnrs' motion to supplement the official record, to panel and Civatt. 12/1/81 ck |
| Dec 2 | Filed resps' memorandum in opposition to petnrs' motion to supplement the official record, to panel and Civatt. 11/30/81 ck |
| Dec 3 | as of 12/1/81 Order (Browning) plfts motion to substitute pages in reply memorandum is granted. -vt- |
| Dec 15 | Filed, as of 12/7/81, pltfs' memorandum in support of motion to compel production, to panel & Civatt. 12/4/81 ck |
| Dec 15 | Filed, as of 12/7/81, resps' statement on motion for an order excluding certain claims, to panel and Civatt. 12/4/81 ck |
| Dec 15 | Filed, as of 12/8/81, statement of resp-intervenors on motion for an order excluding certain claims, to panel and Civatt. 12/7/81 ck |
| Dec 15 | Filed, as of 12/14/81, memorandum of preference customers in support of motion to supplement the record, to panel and Civatt. 12/11/81 |
| Dec 23 | Filed, as of 12/22/81, Order (Browning, Wallace, Boochever) The Honorable George E. Juba, U.S. Magistrate, is appointed special master to make findings and recommendations on the pending motions to compel production of documents, including documents submitted to this court for <i>in camera</i> inspection. The parties may file objections to such findings and recommendations by January 4, 1981. ck |

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- Dec 28 Rec'd, as of 12/18/81, letter dated 12/15/81 from Alvin Alexanderson, PGE, re: allocation of time for plaintiffs-intervenors at oral argument, referred to panel. 12/15/81 ck
- Dec 28 Filed, as of 12/24/81, Report of Special Master (Juba) re: motions to compel production, etc. (see casefile) (panel and parties served 12/24/81) ck

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- Jan 4 Filed, as of 12/28/81 in 81-7806, motion of the Public Power Council, et al. to intervene in, consolidate, and exclude certain claims from suits, to panel and Civatt. 12/23/81 ck
- Jan 4 Filed preference customers plaintiffs objection to report of magistrate, to panel and Civatt. 12/30/81 ck
- Jan 4 Filed industrial customers' response to Public Power Council's motion to intervene in, consolidate, and exclude certain claims, to panel and Civatt. 12/31/81 ck
- Jan 5 Filed, as of 1/4/82, Order (Browning, Wallace & Boochever) Pltf-Intervenors investor owned utilities may have five minutes for oral argument at the hearing of this case. The time of the other parties shall not be reduced. ck
- Jan 7 Filed, as of 1/6/82 in 81-7561, resps' memorandum opposing petnrs' motion to intervene in, consolidate, and exclude certain claims, to Civatt (copies sent to merits panel in 81-7561 by U.S. Atty). 1/4/82 ck
- Jan 7 Filed, as of 1/6/82 in 81-7561, corrected motion of the Public Power Counsel, et al., to intervene in, consolidate and exclude certain claims, to Civatt (and merits panel in 81-7561). 1/5/82 ck

| <u>Date</u> | <u>FILINGS-PROCEEDINGS</u> |
|-------------|---|
| Jan 7 | Filed, as of 1/6/82, resps' supplemental certificate of related cases for resps' brief, to panel. 12/30/81 ck (federal resps') |
| Jan 7 | Filed, as of 1/6/82, resps' (Federal resps') correction to their brief, to panel. 1/5/82 ck |
| Jan 6 | Argued and submitted to: Browning, Wallace & Boochever; CJJ. -jm |
| April 8 | As of 4/7/82, ordered opinion (Boochever) filed & judg to be filed & entd. ck |
| April 8 | As of 4/7/82, filed opinion—remanded. ck |
| April 8 | As of 4/7/82, filed and entered judgment. ck |
| April 16 | Filed, as of 4/15/82, resps' motion for ext of time to file petition for rehearing and to stay issuance of mandate. 4/14/82 ck |
| April 16 | Filed Order (Deputy Ck. for Ct) granting resps' motion for ext of time to file petition for rehearing to May 21, 1982. ck |
| April 22 | Filed petnrs' (Central Lincoln, et al.) bill of costs, to Civatt. 4/20/82 ck |
| April 22 | Filed resps'/intervenors (Aluminum Co. of America, et al.) petition for rehearing and suggestion for rehearing en banc, to panel and all active judges. 4/20/82 ck |
| April 28 | Rec'd, as of 4/27/82, resps' amendment to memorandum submitted in support of resps' motion for enlargement of time to file petition for rehearing and to stay issuance of mandate (no action necessary, ext. of time already granted). 4/26/82 ck |
| May 3 | Filed resps' motion for enlargement of time to file objection to bill of costs. -ho- |
| May 3 | Filed objection to petnr's bill of cost. -ho- (BPA) |

| <u>Date</u> | <u>FILINGS-PROCEEDINGS</u> |
|-------------|--|
| May 18 | Rec'd, as of 5/17/82, notice of appearance of Bruce G. Forrest and Robert S. Greenspan as additional counsel for federal resps. 5/14/82 ck |
| May 20 | Filed orig & 32 copies of resp's (Johnson, et al) petition for rehearing and suggestion for rehearing en banc, to panel and all active judges. 5/19/82 ck |
| Jun 22 | Filed order (Browning) Petrs are requested to respond to resps' petition for rehearing and suggestions for rehearing en banc on or before July 7, 1982. -vt- |
| July 9 | Rec'd, as of 7/8/82, orig & 5 copies of petnrs' (preference customers) response to petition for rehearing (insufficient copies rec'd—notified counsel to send add'l copies), to panel (copies will be distributed to all active judges upon receipt) 7/7/82 ck |
| July 12 | Filed orig & 35 copies of petnrs' (preference customers) response to petition for rehearing (copies to be substituted for those rec'd 7/8/82), filed per Judge Browning, to panel and all active judges. 7/8/82 ck |
| July 14 | Rec'd letter dated 7/12/82 from Donald A. Haagensen, re: through clerical error the petnrs' response to the petition for rehearing, etc., was slow in arriving in the Clerk's Office (no action necessary—response already filed). ck |
| July 16 | Filed fed. resps' motion for leave to file a limited reply to preference customers' response to petition for rehearing and suggestion for rehearing en banc, to panel and all active judges. 7/15/82 ck |

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- July 16 Rec'd orig & 35 copies of fed resps' reply to preference customers' response to petition for rehearing, to panel and all active judges. 7/15/82 ck
- July 27 Rec'd, as of 7/26/82, letter dated 7/22/82 from Alan S. Larsen, Esq. and Wm. David Sprayberry, Esq., re: opposition to resp's motion for leave to file a limited reply to response to petition for rehearing, etc. (counsel notified to send add'l copies for distribution), copies referred to panel. 7/22/82 ck
- July 30 Rec'd, as of 7/29/82, 30 add'l copies of letter of Alan S. Larsen, Esq.: opposition to resp's motion for leave to file a limited reply response, et al., distributed to all active judges. ck
- Sep 7 Filed order (Goodwin & Skopil) The panel in the above-entitled case has agreed to amend the opinion as follows: 1. Insert new footnote at page 6, line 32, stating: 4. We find no support for the contention that 5(d) (1) (B) guarantees the nonfirm power needed to serve the DSIs' first quartile. Section 5(d)(1)(B) expressly links the DSIs' present allocation to their entitlement under the 1975 contracts. It is undisputed that under the 1975 contract the DSIs' received nonfirm power only after the preference customers filled their nonfirm needs. Thus, subsection (B) does not entitle the DSIs' to nonfirm power for the first quartile under the contracts now at issue. Moreover, 5(g)(7) does not alter this conclusion because it does not grant the DSIs' any greater entitlement than what they received under the 1975 contracts. 2. Renumber all sub-

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sequent footnotes and signals. 3. Change footnote 10 (old footnote 9) to read: 10. Because we find that the priority given the DSIs' for nonfirm power violates the preference provisions of the act, we need not determine whether BPA failed to follow required procedures in adopting its interpretation of the Act. -ho-

- Sep 21 Filed resp intervenors (DIS) motion for leave to file suppl. pleadings. (panel & all active) -vt-
- Sep 21 Rec'd orig & 33 copies of resp intervenors (DIS) supplement to petition for rehearing & suggestion for rehearing en banc. (panel & all active) -vt-
- Sep 27 Filed order (Browning, Wallace & Boochever) The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected. -vt-
- Sep 29 Filed resp/intervenors motion to stay mandate. (panel) -vt-
- Sep 29 Filed resp/intervenors emergency motion to stay mandate. (panel) -vt-
- Oct 1 Filed (PGP) response to emergency motion to stay manadate. (panel) -vt-
- Oct 4 as of 9/29/82 Filed order (Browning) The emergency motion to stay mandate is so ordered. -vt-
- Oct 4 Filed resp memorandum of law in response to resp/intervenors emergency motion to stay mandate. (panel) -vt-
- Oct 6 Filed Public Power Council response to motion filed by Industrial Customers to stay mandate. (panel) -vt-

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- Oct 12 The issuance of the mandate in this case is stayed until fourteen (14) days after the United States Supreme Court finally disposes of the case. This stay is conditioned upon the respondent-intervenor industrial customers applying for a writ of certiorari within ninety (90) days from the entry of judgment by this court, good cause having been shown for granting a stay in excess of thirty (30) days. -ho-
- Oct 18 Rec'd Resp's objection to Petnr's bill of cost with motion to file late. -ho-
- Oct 27 Filed Petnr's (Preference Customers') Response to BPA's objection to bill of cost. (Civatt) -ho-
- Nov 12 Filed Order (Browning, Wallace & Boochever) Motion for leave to file supplementary pleading is granted, and the supplement to DSI Petition for rehearing and suggestion for rehearing en banc shall be filed by the clerk. The order of September 27, 1982, denying the petition for rehearing and rejecting the suggestion for rehearing en banc remains in effect. -ho-
- Dec 3 Filed motion to dismiss as to Stauffer Chemical Company (panel) jt
- Dec 23 Filed Resp/intervenor (DSI) certificate of compliance with order re stay of mandate with appendix. (panel) -vt-

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- Jan 17 Filed order (Browning, Wallace & Boochever) The motion to dismiss this appeal as to Stauffer Chemical Company only is granted. -vt-
- Mar 31 Filed cert. copy of SC order granting certiorari on Mar. 28, 1983. (Panel) ag

**MEMORANDUM IN OPPOSITION TO MOTION
FOR TEMPORARY INJUNCTION OR STAY
PENDING REVIEW**

[Filed Sept. 8, 1981]

In the United States Court of Appeals
For the Ninth Circuit

No. 81-7561

[Case omitted in printing.]

TABLE 1¹

| Industrial Purchaser | Terminated IF Contract Demand July 1, 1982 ² | Authorized Increases July 1, 1982 | Technological Allowances | New Contract Demand ³ |
|-----------------------|--|--|-----------------------------|--|
| Alcoa | 586.0 MW | | 14. MW | 600.0 |
| Anaconda | 421.8 | | 3.7 | 427.5 ⁴ |
| Carborundum | 29.75 | 1.8 MW | 2.45 | 34.0 |
| Crown Zellerback ... | 13.6 | 3.0 | | 16.6 |
| Georgia Pacific | 34.44 | | | 34.40 |
| Hanna | 113.28 | 2.0 | | 115.20 |
| Intalco | 436.0 | 9.6 ⁵ | | 445.6 |
| Kaiser | 715.1 | | 22.43 | 737.53 |
| Martin Marietta | 426.9 | | 22.816 | 453.516 ⁶ |
| Ormet | 18.0 | | | 18.0 |
| Pacific Carbide | 8.0 | 1.0 | .309 | 9.297 |
| Pennwalt | 55.33 | 28.7 | | 84.0 |
| Reynolds | 689.5 | 7.9 | 3.3 | 700.7 |
| Stauffer | 79.8 | | | 79.8 |
| Union | | | | |
| Carbide/Elkem ... | 18.7 | 11.3 | | 30. |
| | 3646.20 | 65.3 | 69.005 | 3786.143 |

¹There are differences between this table and petitioners' table because the petitioners' table includes authorized increases in the existing contract demands in some cases, while ignoring them in other cases. In addition, the contract demands in the petitioners' table do not include technological allowances.

²These demands are from § 4 in Exhibit A in Exhibit Q to the Complaint, also referred to as the Industrial Firm, or "IF" Contracts.

³In certain cases, the new contract demand has been adjusted *downward* from the entitlement to correspond to the multiplier built into the meter installed at the industrial purchaser's plant. Please note the distinction, as provided in the new contract, with contract demand established as the upper limit which may not be exceeded by the purchaser's Operating Demand and operating level.

⁴This includes an adjustment for 2.0 MW of transmission losses that are no longer incurred following settlement of the at-site power rate with Anaconda.

⁵This results from service of Additional Power as provided for in the interim IF Contracts.

⁶This includes an adjustment for 3.8 MW of transmission losses that are no longer incurred following settlement of the at-site power rate with Martin Marietta.

TABLE II
COMPARISON OF SECOND QUARTILE
RESTRICTION RIGHTS

| Basis for Restriction | Mid-Year Restriction | | Subsequent-Year Restriction | | Government Order | |
|--|---------------------------------|---|---|--|---|--------------------------------------|
| | Terminated 1975 Contracts | New Contracts § 7(d) (2) | Terminated 1975 Contracts § 8(d) Exhibit C | New Contracts § 7(d)(1) & (2) & 7(f) | Terminated 1975 Contracts § 8(d) Exhibit C | New Contracts § 7(d) (1)(C) |
| Delay of Plant | No | Yes ¹ ($\frac{1}{2}$ of Outage) | Yes | Yes ² | Yes | Yes ³ |
| Unexpectedly Poor Performance: | | | | | | |
| —Failure to At- tain Designed Capability | No | Yes ($\frac{1}{2}$ of Outage) | Yes | Yes | Yes | Yes |
| —Forced Outage after Attaining Commercial Operation | No | Yes ($\frac{1}{2}$ of Outage) | No | Yes ($\frac{1}{2}$ of Outage) | No | No |

¹In cases where restrictions are shown to one-half of the outage, the Administrator may restrict up to one-half the amount of energy by which he estimates that he will be unable to meet his firm obligations. This occurs before applying additional acquisitions of energy against such deficit, and these acquisitions apply first to the Administrator's (i.e., the region's) share of the deficit.

²The Administrator has placed a 7-year limit on his ability to restrict for the delay of any resource. This is consistent with BPA's ability to acquire replacement resources on a planning basis and the planning assumptions for notices of insufficiency and service of new large loads contained in the utility contract. The obligation to treat the Second Quartile as a firm load for purposes of resource planning existed before the new contracts, but was not explicitly related to the 7-year planning period.

³The new contracts except laws or ordinances enacted by legislative bodies and ballot measures as a basis for restriction due to governmental order. The Regional Act requires the DSI's to provide reserves for the failure of planned resources BPA is relying upon. A ballot measure or legislative action to terminate a resource is, in effect, a decision to unplan a resource; the DSI's do not provide a reserve for this contingency; utilities, themselves, do not provide reserves for this contingency.

SECOND AMENDED COMPLAINT

[Filed Nov. 2, 1981]

In the United States Court of Appeals
For the Ninth Circuit

No. 81-7561

[Case omitted in printing.]

I

JURISDICTION

This action arises under 16 U.S.C. § 832-832l (Bonneville Project Act), 16 U.S.C. § 838f (the Federal Columbia River Transmission Act), 16 U.S.C. § 825s (Flood Control Act), P.L. 96-501 (Pacific Northwest Electric Power Planning and Conservation Act, hereinafter referred to as the "Regional Act"), and 5 U.S.C. § 704 (Administrative Procedures Act).

This court has jurisdiction under Section 9(e)(5) of P.L. 96-501, and has the authority to grant the relief requested under 5 U.S.C. § 702 and 28 U.S.C. §§ 2201, 2202 (Declaratory Judgment Act). The amount in controversy exceeds \$10,000, exclusive of interest and costs.

II

VENUE

The United States Court of Appeals for the Ninth Circuit is a proper venue for this action under P.L. 96-501 § 9(e)(5) which provides that suits challenging final determinations by the Bonneville Power Administrator (Administrator) taken pursuant to the Regional Act shall be filed in the United States Court of Appeals for the region.

III *PARTIES*

Public Utility District No. 1 of Chelan County, Public Utility District No. 1 of Cowlitz County, Public Utility District No. 1 of Douglas County, Public Utility District No. 1 of Snohomish County, and Public Utility District No. 2 of Grant County are municipal corporations organized and existing under the laws of the State of Washington. Central Lincoln Peoples' Utility District, Clatskanie Peoples' Utility District, Northern Wasco County Peoples' Utility District, and Tillamook Peoples' Utility District are public corporations organized and existing under the laws of the State of Oregon. The Eugene Water & Electric Board is a part of the City of Eugene, a municipal corporation organized and existing under the laws of the State of Oregon. The City of Seattle, City Light Department and the City of Tacoma, Department of Public Utilities are departments of their respective cities which are municipal corporations organized and existing under the laws of the State of Washington.

These plaintiffs provide electric service to over 750,000 customers and approximately 2 million people in their service areas. The Bonneville Power Administration (BPA) sells approximately 25% of its total sales of electric energy to these plaintiffs. Several of these parties generate electric power and all purchase substantial amounts of wholesale electric power and energy from BPA as public bodies entitled to preference and priority within the meaning of 16 U.S.C. § 832c and § 825s and §§ 5(a) and 10(c) of the Regional Act.

Defendant Peter Johnson is the Administrator of the Bonneville Power Administration, an agency within the Department of Energy. Defendant James Edwards is the Secretary of the Department of Energy, an agency of the United States. Defendant United States of America is the

sovereign body in charge of the Department of Energy and the Bonneville Power Administration.

IV

DESCRIPTION

BPA markets for sale and distribution federally owned electric power in the Pacific Northwest. BPA markets wholesale power for resale by public bodies and cooperatives which are given preference to that power under various federal statutes.

BPA also markets power directly to fifteen corporations at their plants located in the Northwest. These corporations, plus Alumax, are known as BPA's direct service industrial customers (industrial purchasers). On August 28, 1981, BPA offered new power sales contracts, which are attached and marked as Exhibits A through P, to the industrial purchasers. These contracts are intended to terminate existing contracts (the 1975 contracts) with the industrial purchasers. A representative 1975 contract is attached as Exhibit Q.

These industrial purchasers now consume approximately 35% of the power marketed by BPA, while paying approximately 25% of BPA's total revenues. The power that these industrial purchasers receive from BPA is divided into four quartiles or quarters of power. Electric power is kilowatts and kilowatt hours commonly called demand and energy.

Certain provisions of these contracts offered by the Administrator as they relate to nonfirm power sales violate the Administrator's statutory authority set forth in 16 U.S.C. § 832-832l, 16 U.S.C. § 838f, 16 U.S.C. § 825s, P.L. 96-501, 5 U.S.C. §§ 552, 704, and the rules and procedures of the Administrator at 45 Fed. Reg. 73,531 (1980).

V

STATUTORY VIOLATIONS

The Bonneville Project Act, as amended [16 U.S.C. § 832c(a) and § 832c(b)], provides that the Administrator shall at all times, in marketing federal energy, give preference and priority to public bodies and cooperatives, including these plaintiffs. The Flood Control Act [16 U.S.C. § 825s] and the Federal Columbia River System Transmission Act [16 U.S.C. § 838] reaffirm these preference and priority provisions. The Regional Act [P.L. 96-501] reaffirms this preference and priority in § 10(c) and other sections, and specifically provides in § 5(a) that all power sales by the Administrator pursuant to the Regional Act are subject to this preference and priority to public bodies and cooperatives.

Section 5(d)(1) of the Regional Act provides that under these new contracts offered to Industrial Purchasers, which must be offered simultaneously under § 5(g)(1) by the Administrator with new contracts offered to other specified customers, the industrial purchasers may only receive an amount of power equivalent to the amount that they were entitled to in their contracts dated January or April of 1975.

45 Fed. Reg. 73,531 (1980) provides that BPA meet certain requirements, including giving public notice and providing opportunity for public comment, for any change in federal marketing policy which will raise substantial legal or factual issues or is likely to have a substantial impact on the nation's economy or large numbers of individuals or businesses.

Sections 7(c), 7(e)(6), 8(a)(2) and 8(c)(9) of the new contracts violate the above statutory, procedural and administrative provisions. In offering these contract provisions the Administrator acted arbitrarily and capriciously and without jurisdiction.

VI

PLAINTIFFS' INTEREST

1. Acceptance of the new contracts and performance under those contracts would have a direct impact on plaintiffs' operation of their own power generating resources and on their production of power.

2. Acceptance of the new contracts and performance under those contracts would directly affect the cost and amount of power purchased by these plaintiffs, as preference and priority customers, from BPA, because the new contracts provide for revised priorities for nonfirm energy produced by the federal system and provide the industrial purchasers with more than an equivalent amount of power compared to their 1975 contracts.

3. Acceptance of the new contracts and performance under those contracts would increase the risk that these plaintiffs will be unable to adequately serve their customers.

4. Acceptance of the new contracts and performance under those contracts could result in permanent damage to several of plaintiffs' power generating resources because water reserves could be depleted under certain conditions to an extent beyond any practical likelihood of replacement.

5. Acceptance of the new contracts and performance under those contracts will adversely impact the plans of certain of the plaintiffs for the construction and operation of new power generating resources.

6. For each and all of the above reasons, plaintiffs are interested parties entitled to a declaratory judgment and further relief based thereon and are persons adversely affected by the action of the Administrator and entitled to judicial review thereof.

VII.

RELIEF REQUESTED

WHEREFORE, plaintiffs pray for a decree and order:

1. Declaring that certain provisions of the offered contracts are illegal and unauthorized and that these provisions have, in addition, been prepared and offered in violation of the Administrator's rules and procedures, and are without any effect whatsoever.

2. Enjoining the Administrator from performing according to certain provisions under the offered contracts if any industrial purchasers accept or attempt to accept the Administrator's offers.

3. Granting plaintiffs their costs and disbursement incurred herein.

4. Such additional or other relief as the court may deem just and equitable.

Respectfully submitted,
SCHWABE, WILLIAMSON, WYATT,
MOORE & ROBERTS

By: /s/ JAY T. WALDRON
Of Attorneys for Plaintiffs

I hereby certify that the
foregoing is a true copy
of the original hereof.

By: /s/ ALAN S. LARSEN
Of Attorneys for Plaintiff

(Exhibit B to Preference Customer
Memorandum, filed Nov. 2, 1981)

DOE/EIS-0066

Excerpts From
Final Environmental Impact Statement
(Title Page, pages IV-71, IV-80, IV-85, and IV-86)

The Role of the Bonneville Power Administration
in the Pacific Northwest Power Supply System
Including Its Participation In A
Hydro-Thermal Power Program

U.S. Department of Energy
Washington, D.C. 20545

December 1980

Responsible Official
/s/ RUTH CLUSEN
Ruth Clusen
Assistant Secretary
for Environment

• • •

[IV-71]*c. Secondary and Surplus Power Sales.**(1) Allocation of Nonfirm Power.*

Nonfirm energy is available when there is more than enough water in Federal reservoirs to meet the Federal system's firm energy commitment. The current secondary sales policy calls for the following priorities in the allocation of any secondary energy: (1) All firm energy loads will be served if any are not being met. This includes the bottom three quartiles of the direct-service industrial (DSI) load; (2) new reservoirs will be filled or depleted reservoirs restored; (3) public agencies' secondary power demands will be met, allowing them to refill their own reservoirs or displace thermal generation currently being used to serve their own loads; (4) when not all secondary demands can be met, the remaining energy is split approximately equally between the private utilities and the direct-service industries of the region; (5) after the top quartile of the DSI loads has been met, private utilities in the region can then purchase secondary energy to displace any of their remaining thermal generation which they have declared necessary for meeting firm loads under the Pacific Northwest Coordination Agreement; and (6) after all applicable regional loads have been met, and water cannot be considered for later use in the region, surplus power is made available for sale to the Pacific Southwest over the California Intertie.

It should be noted that this is an extremely dynamic situation and the status of power availability can vary not only from month to month and week to week, but also from hour to hour, depending upon a wide range of variables.

From 1968 to 1978, annual sales to California varied from a low of 0 MWh in 1973 to a high of 17,094,309 MWh in 1976. It is anticipated in future years that as the mar-

gin between projected loads and energy available under good water years declines, decreasing amounts of surplus energy will be available for sale outside the region.

Allocation priorities for surplus sales outside the region are similar to those inside the region; that is, preference customers in the Southwest have first call on the surplus energy.

* * *

[IV-80] meet load. BPA anticipates continuing to operate under the interim agreements, allowing service to each company to terminate on the expiration date of their modified firm power contract. These dates as well as each company's contract demand are presented in Table IV-12. (For informational purposes and in response to RDEIS comments, Figure IV-3 and Table IV-11 have been provided.)

BPA is currently developing an allocations policy which will address future service to all of the region's customers, including the DSIs. Discussion in this document is limited to the existing contracts. This section identifies and discusses the provisions of both the modified firm and industrial firm power contracts and the impacts of these sales on the power system. Site-specific impacts of the plants themselves are covered at the end of the section. (A detailed history of service to the DSIs is included in Appendix C of the Draft Role EIS.)

At the present time BPA sells power directly to 15 industrial corporations with a total of 21 plants. Six plants are in Oregon, 13 are in Washington, and two are in Montana. Ten of the plants produce primary aluminum metal and account for approximately 90 percent of the direct-service industrial load. As of March 1, 1979, the DSIs had a contract demand of approximately 3400 MW of IF-1 power.

(2) *Power Sales Contracts.*(a) *Industrial Firm Power.*

Industrial firm power (IF) agreements provide Bonneville with several different restriction rights which provide certain specified reserves. While each kilowatt of the DSI contract demand is subject to the different types of reserves provided by Bonneville's restriction rights, the IF agreements divide the DSI contract demand into quartiles for ease of administration. Each quartile has different conditions under which service can be interrupted to provide reserves to Bonneville.

Top Quartile: At any time for any period for any reason. BPA will give as much notice as possible.

This quartile is served from secondary energy available only on an intermittent basis and is frequently interrupted. When prudent operation dictates the top quartile of the IF load be interrupted to ensure service to BPA firm loads, BPA will frequently make available Advance Energy. This energy is sold with the agreement the DSIs will return equal energy at a later time if BPA needs it to meet preference customer loads. This is done either through DSI energy purchases from other entities or through load interruption. If, under prevailing conditions, BPA cannot serve the top quartile with Federal power, it acts as a trust agent for the DSIs in the purchase of outside power and, when available, schedules the deliveries onto the power . . .

* * *

[IV-85] Under the same conditions of system stability as identified under the second quartile, BPA can interrupt without notice:

1. All the load except that required for plant security for up to 5 minutes to maintain stability.
2. One-half the load for up to 2 hours in any day. Total restriction in kWh under this category

in any calendar year shall not exceed 50 multiplied by the Contract Demand.

Authorized Increase: This class of nonfirm power is provided for on some DSI contracts. It is not included in IF contract demands and is served under essentially the same conditions as the top quartile of IF power with the following exceptions; Authorized Increase will be restricted prior to restriction of top quartile of IF power, and Advance Energy will not be made available for Authorized Increase. The Authorized Increase contract section provides for an increase in industrial loads of 1 percent per year accumulatively, from July 1, 1978, through the term of the contract, of the industrial purchasers maximum demand for IF power. These increases in plant loads, for technological reasons other than plant expansion, are restricted to: improvement in the operation of the equipment installed in the purchasers plant, modification of such equipment, installation of additional auxiliary equipment, and installation of environmental protection equipment.

If any portion of the Authorized Increase is converted to IF power, it becomes subject to the restriction provisions of second quartile of IF power listed above.

In the event service to the DSIs is interrupted, the IF contracts contain a rate availability credit. This credit reduces the rate paid by the DSIs as power availability decreases. Basically, as the percentage of IF contract demand served by Bonneville decreases due to Bonneville's exercise of restriction rights, the rate paid by the DSIs for the power actually provided decreases. The availability credit does not apply if advance energy is provided.

(b) *Modified Firm Power.*

Modified firm power contracts (MF) differ from industrial firm power contracts in three areas: BPA's ability to restrict service, the rate availability credit, and advance energy.

The interruptibility arrangements under the modified firm power contracts are more limited than with the IF interim agreements. The top quartile (which is served with secondary energy) remains interruptible at any time for any reason. The remainder of the MF load can be restricted only:

[IV-86] To the extent necessary to minimize restriction of firm power as a result of system stability problems or forced outages of Federal system facilities, including transmission facilities, Federal generating plants, or generating plants from which BPA acquires power. No notice is required. Total restriction for forced outages in kWh under this category in any calendar year shall not exceed 500 multiplied by the Contract Demand.

Additionally, MF contracts contain no provisions for rate credits when power is available less than 100 percent of the time.

Finally, the MF contracts contain no provisions for advance energy sales. Sale of advance energy under MF contracts energy would require new contracts to replace the provisional sale contracts which expired in 1974.

(3) *Impacts on the Power System*

(a) *Operations.*

Under the IF and MF contracts, the DSIs have a significant impact on operations of the regional power system. In addition to providing a market for reserves which is unique to the Northwest, their extremely high load factor allows BPA to more easily meet minimum river flows dur-

ing utility light load hours, to provide for interregional energy exchanges, and to more efficiently operate regional baseload thermal facilities. Finally, through advance energy sales, the DSIs allow for higher utilization of the river system's power capabilities.

Reserves—In the rest of the country energy and capacity reserves are provided by idle or excess generation of various types. This generation is utilized only occasionally. In addition, utilities plan to build resources ahead of need to allow for construction delays, etc. All of these reserves are costs to utilities and therefore to ratepayers. In the Pacific Northwest, reserves are provided by the use of restriction conditions in Bonneville's contracts with the DSIs, as well as by standby generation. These restriction conditions allow Bonneville to sell energy and capacity which otherwise would be idle to provide reserves, resulting in more efficient use of resources and adding revenues to the system. Without the restriction conditions the energy and capacity provided under the DSI contracts would be unavailable to the DSIs since Bonneville would have to hold such generation as reserves. The restriction conditions also allow the DSIs to adjust their operations to reflect market conditions for their products. Reserves provided by the DSIs include:

Operating Reserves: In daily operations, BPA is required to maintain a minimum generation operation reserve to ensure reliability in the event generator or transmission outages jeopardize service to customers. The amount of operating reserve carried during each hour.

. . .

(Exhibit E to Preference Customer Memorandum,
filed Nov. 2, 1981)

Official Report of Proceedings

Before the
United States Department of Energy
Bonneville Power Administration
Portland, Oregon

Docket No.

In the Matter of:

Proposed Transmission Rate Adjustment
and
Proposed Wholesale Power Rate Adjustment

Place: Portland, Oregon

Date: April 4, 1981

Volume XII

Pages: 2002 - 2249

(By Mr. Wilcox) What's the complexity?

MS. MELTON: The complexity—one of the ones that we've identified among us up here is that you're assuming that the costs would be assigned directly to the DSI's and therefore we could say that there would be an additional cost. Any additional cost that Bonneville would have to incur would be spread over all its ratepayers; so what the net effect of all of that would be, we aren't able to say.

Q. No, I'm not asking how those costs are allocated. I'm simply asking, for total costs—not who pays those total costs—what would it cost? Would it cost more than \$86 million to provide the DSI's with the same quality of power that all other loads in the region receive?

MS. MELTON: I think that that's probably true.

Q. Okay. Have the DSI's—has BPA ever interrupted any power deliveries to the DSI's?

MR. DEAN: Yes.

Q. Do you know the amount of BPA interruptions over the past five or ten years?

MR. WOOD: As far as clarification, your Honor, are we referring to interruptions—planned interruptions or forced outages? Are we referring to the firm loads or the interruptable loads? I'm not sure what the question is.

Q. (By Mr. Wilcox) Well, let's begin with the top quartile. Do you have any estimate of the amount and frequency and duration of interruptions of the top quartile over the past five to ten years?

MR. DEAN: Yes.

Q. Could you provide those?

MR. DEAN: Well, in anticipation of that question, I looked at the amount of—well, I've looked at the periods when BPA supplied direct non-firm service to the top quartile during the last five years.

Q. And what did that show?

MR. DEAN: Well, of course, direct service is provided from time to time and restricted from time to time. The response to the question would be a long list of details. I suppose to distill it to the least detail would be to say that in the five calendar years beginning January 1, 1976, BPA supplied direct non-firm service to the top quartile about 46 percent of the time. In addition, we supplied service by using advance energy about 21 percent of the time.

(Exhibit C to Preference Customer
Memorandum, Filed Nov. 2, 1981)

Bernard Goldhammer Memorandum

Filed November 30, 1982

In the United States Court of Appeals
For the Ninth Circuit

No. 81-7561

[Case omitted in printing.]

United States Government
Memorandum

Date: November 1, 1974

In reply refer to: P

To: Donald Paul Hodel, Administrator—A

From: Bernard Goldhammer, Assistant Administrator
for Power Management—P

Subject: Industrial Firm Power

For nearly three years we have been negotiating with our direct-service industrial customers new 20-year contracts with a lower grade of power than they now receive in order to provide BPA with additional reserves. To implement such lower grade of power, the Secretary of the Interior on August 15, 1974, filed with the Federal Power Commission an "Industrial Firm Power Rate," along with other proposed rate schedules and general rate schedule provisions. If the proposed schedules and provisions are approved by the Federal Power Commission, they would be effective December 20, 1974. We are proposing to make the new industrial contracts effective January 1, 1975, in order that BPA can secure the additional reserves at the earliest

possible date. Since the new 20-year industrial contracts will soon be presented for your review, I thought it desirable to review the background and the considerations for the new contracts.

Background

In 1969 Bonneville's participation in the Hydro-Thermal Power Program was approved by the National Administration. Bonneville and utilities in the region proceeded to implement the program with necessary contracts and the non-Federal utilities proceeded with construction or planned construction of large thermal generating units. The scheduling of these new power resources was designed to meet the requirements of all utilities in the West Group Area of the Northwest Power Pool and to provide modest increases for the large industrial customers served directly by BPA, as well as renewal of their power sales contracts.

We soon realized that a significant shortcoming of Phase 1 of the Hydro-Thermal Power Program was the lack of reserves for possible delays in initial operation of generating units and the possibility of operations of new resources below capacity for a period of time. This fear has been confirmed by the delays or less-than-full operation of the early thermal plants scheduled under the program. For example, the Trojan Nuclear Plant, from which Bonneville will obtain 30 percent of the output through net billing, was originally scheduled for commercial operation in 1974; it is now scheduled for late 1975 and operation could be delayed until 1976. The WPPSS No. 2 plant at Hanford was originally scheduled for commercial operation in 1977; it is now scheduled for 1978 with a high probability that it will be at least 1979 before the plant is in commercial operation. Bonneville will obtain 100 percent of the output from this plant. The Centralia coal-fired generating units started initial operations on schedule but the first three years of operation were below capacity as a result of in-

ability to meet air quality standards and difficulties in mining and handling coal. We still do not know if the Centralia generating units will be able to operate at capacity in their fourth year—the current year—of operation. The nuclear generating units under the program could similarly be limited as to their operation particularly in the initial period following commercial operation.

Industrial Sales

Soon after approval of the Hydro-Thermal Power Program in 1969, Bonneville, together with industrial customers and preference customers, started developing an "Industrial Sales Policy." With a small amount of power available for expansion of the large electroprocess loads and with three industrial contracts expiring in 1973, it was necessary to define under what terms and conditions additional power would be supplied to industry served by BPA, and the terms and conditions for renewal of industrial contracts. A policy was agreed upon and adopted by BPA on January 22, 1971. At that time the Federal Columbia River Power System was experiencing extensive slippages in the schedule of hydroelectric units. Reserves were not adequate to cover such slippage so it was agreed that the grade of power sold industry on renewal of contracts or for plant expansion would be a lower grade of power than the modified firm power then provided. Industrial contracts that have been renewed and additional power supplied industry under Phase 1 of the Hydro-Thermal Power Program contained contract terms which gave BPA the right to restrict deliveries. These rights to restrict deliveries are similar to those under "Industrial Firm Power."

The "Industrial Sales Policy" further provided that at least 25 percent of the Industrial Load would be served on an interruptible basis. It was also recognized and provided for in the "Industrial Sales Policy" that new 20-year contracts might be a condition for industrial customers to give

up existing contracts and take Industrial Firm Power in place of the higher grade Modified Firm Power.

Phase 2

Higher costs and longer lead times in construction of large thermal electric generating plants than were projected at the start of the Hydro-Thermal Power Program created difficulties in continuing the "net billing."

The final blow to "net billing" came in August 1972 when the U.S. Treasury Department issued regulations under the Industrial Revenue Bond Act of 1969 that provided that the Federal Government was no longer an exempt agency. This meant if BPA acquired more than 25 percent of the output of public systems' share of a thermal generating plant, the interest on the bonds the public system issued would not be exempt from Federal income taxes. This was not acceptable to publicly owned systems. These factors resulted in modifications of Phase 1 which is called Phase 2. Phase 2 envisaged new 20-year contracts for all industrial customers if they would take the lower grade Industrial Firm Power in place of Modified Firm Power and relinquish their rights under existing contracts so as to enable BPA to meet its firm commitments to existing preference customers. Phase 2 also projected that Bonneville would provide sufficient firm power for preference customers' load growth only through June 30, 1983. At that time there would be an allocation of firm energy to all preference customers served by BPA. Beginning July 1, 1983, preference customers would arrange for non-Federal resources to meet their load growth after that date.

Even if all resources under construction are available on their present schedule and operate at anticipated capacity, the Federal Columbia River Power System will experience a firm energy deficiency in each year 1977-78 through 1980-81. If there is a 1-year or 2-year delay in the resources,

then the situation becomes even more critical. Tables 1, 2, 3, and 4 show the regional and Federal Columbia River Power System's loads and resources on present schedules and with the assumption of 1-year and 2-year delays in the thermal plants, and then with a 1-year and 2-year delay in the thermal plants and a 1-year delay in the hydro installations.

Additional Resources

With the possibility that the Federal System will be unable to meet its contractual commitments under adverse hydro conditions and unable to meet the requirements of the Coordination Agreement to have sufficient load-carrying capability to serve all firm loads under adverse hydroelectric conditions, we attempted to secure additional resources. Since we recognized the large potential liability in case of breach of contract, we explored all avenues of potential power supply irrespective of cost.

One of the first avenues explored by Bonneville and the utilities in the area was the possibility of installing combustion turbines. After much discussion and analysis, two factors discouraged proceeding with such generating units: (1) the strong environmental objection in the area to this type of generation, and (2) the inability to assure a fuel supply.

BPA at the same time discussed with neighboring utilities in California, Montana, Idaho, and British Columbia the possibility of securing energy from such utilities during the late 1970's and early 1980's to make up the deficiency. No power could be guaranteed during that period by any of these utilities.

At our urging, the Centralia participants examined the possibility of a third unit at the coal-fired generating plant at Centralia. Bonneville was prepared to acquire one-third of the output of this proposed 700 megawatt unit, the in-

dustrial customers also were interested in acquiring one-third, which would serve as a reserve in case of delays in other generating plants, and the Centralia owners would take the remaining one-third. The very strong objections of the Southwestern Washington Pollution Control Authority because of the additional particulate matter that would be released in the atmosphere led the interested parties to the conclusion that Centralia Unit No. 3 was not at that time a viable project. Further examination was abandoned for the time being.

We concluded that the only way we could be assured of meeting our firm power commitments was to attempt to reduce BPA's firm power obligations during the period in which BPA's load-resource imbalance was most critical. This could best be accomplished by persuading our industrial customers to give up their existing rights to power in exchange for a lower grade of power than they now receive. We recognized this would require some trade-offs since existing industrial contracts run past the period in which we project the large deficiencies.

This would not be the first time that a trade-off was made with industrial customers to provide BPA with needed reserves. In 1965, BPA established "Modified Firm Power" for industrial use to provide the additional reserves needed for the thermal nuclear generating plant then under construction at Hanford, Washington. In turn for providing these reserves, industries paid less for modified firm power than for firm power.

Existing Industrial Contracts

BPA has contracted for nearly 3,000 megawatts of modified firm power to industrial customers and serves these customers about an additional 1,000 megawatts on an interruptible power basis. Table 5 lists BPA's industrial contracts. These contracts were all made in accordance with a commitment policy which assured preference customers

that BPA would meet their requirements for a reasonable period in the future. Commitments were made during World War II and the Korean War when industrial plants were needed to provide essential war materials. Most of these contracts were renewed with substantial expansion of facilities in the middle 1960's. The power in the 1960's was made available from the large gain in firm power in the United States as a result of the Treaty with Canada for Joint Development of the Columbia River. To make the Treaty economic so as to secure the flood control as well as the power benefits, the downstream benefits accruing to the United States had to be marketed when it became available. This meant selling part of such power for industrial expansion.

Industrial Firm Power

As part of our 1974 rate review we started early in 1972 discussing with our industrial customers rate schedules and general rate schedule provisions for a lower grade of power than they were receiving. We also recognized that as a result of plant delays, the grade of power would have to be a lower grade than we contemplated when we adopted our Industrial Sales Policy.

After numerous meetings with our industrial customers, we arrived at what we call Industrial Firm Power. This grade of power is quite different than power sold by any other utility, any place. Each kilowatt of Industrial Firm Power has the following characteristics:

- (1) One-fourth of the contract demand can be restricted by BPA at any time.
- (2) One-fourth of the contract demand can be restricted by BPA for the following reasons:
 - (a) forced outages on the Federal System or on systems from which the Federal System secures power. Such restriction can take place only to the

extent that Bonneville is unable to meet its firm power commitments as a result of such forced outages. The amount of restriction expressed in kilowatt-hours is limited to 375 times the contract demand for any calendar year;

(b) delays in generation schedules or inability to operate a unit at capacity on the Federal System or on systems from which the Federal System secures power when, as a result of such delays or inability to operate at capacity, Bonneville cannot meet its firm obligations including Industrial Firm Power; and

(c) transmission outages.

(3) One-fourth of the contract demand may be restricted to provide a regional reserve for delays in non-Federal generation units or inability to operate such units at capacity, but only to the extent that each industry is first given the opportunity to participate in reserve generating units or plants and elected not to do so. It is to be noted that the credit of the industrial customers is necessary to finance such reserve generating facilities. It is expected that most of the industrial customers taking Industrial Firm Power will elect to take their share of the output from the reserve plants (about 1,000 megawatts) and pay the cost of such power. This power, when delivered, will replace up to one-fourth the industrial load. However, if a generating unit (other than the reserve plant) is delayed or expected to operate at less than rated capacity, the utilities participating in it may withdraw reserve plant power from industry. If a particular industrial customer taking Industrial Firm Power elects not to participate in a reserve plant, such customer's contract demand can be restricted as stated above.

(4) BPA can restrict one-half of each industrial customer's load then operating for 2 hours in any day

if BPA cannot meet its firm obligations, including Industrial Firm Power. The total limitation expressed in kilowatt-hours under this provision for any one year is 50 times the contract demand.

(5) Bonneville can restrict the entire industrial load, except an amount necessary for security purposes (such as providing energy for pumps for fire protection), for 5 minutes to provide system stability and reliability.

Results

Our analysis indicates that this lower grade of power will enable us to squeeze by the late 1970's and early 1980's even with a 1-year delay in scheduled resources. We still face minor deficiencies with possible 2-year delays in scheduled resources. With longer delays we face serious problems. Although the major need for additional reserves is in the late 1970's and early 1980's, the lower grade of power to industry will provide a desirable reserve for the Federal Columbia River Power System for the 20-year duration of proposed new contracts.

Industries' Situation

During the term of industrial contracts (most of which expire in the middle 1980's), Bonneville has no authority to reduce the grade of power to the industries without their concurrence. To encourage industries to give up their existing power sales contracts and to take the lower grade of power, I propose that Bonneville offer the industrial customers new contracts for such power with a 20-year term from January 1, 1975, through December 31, 1994. These new contracts must provide some advantages to industry in order for them to give up their existing contracts. The significant advantage to industry is that the new contracts would enable industry to obtain Bonneville power for 20 years through 1994. We have informed the

industries that it is unlikely that the new contracts would be extended beyond 1994 except for interruptible power. Hence industry will then need new power sources if it is to continue to operate in the region.

If an industry chooses not to take the new contract with the lower grade of power, it can continue with its present contract but its contract probably cannot be renewed when it expires.

Industrial Firm Power Rate

We have designed the Industrial Firm Power Rate Schedule to go with new contracts. Under this rate schedule, charges will vary in accordance with the annual availability of power. If availability is 100 percent for the year, industries will pay the same rate as utilities do for firm power, but there is a sliding scale reduction in charges if Industrial Firm Power availability is less than 100 percent. This proposed rate schedule along with other proposed rates was filed by the Secretary of the Interior with the Federal Power Commission on August 15, 1974. This power rate based on availability is another consideration to induce industrial customers to terminate existing contracts and accept new contracts with the lower grade of power.

BPA's Advantage

As indicated above the proposed new 20-year industrial contracts with Industrial Firm Power is BPA's only viable alternative for securing needed reserves for new power resources. Without such reserves, BPA may by necessity have to breach contracts in the late 1970's or early 1980's. The cost to BPA of such contract breach could be substantial amounting to several millions of dollars for each breach. In addition, the cost to the region of an unreliable power supply is beyond estimate. In the long run, the lower grade of power to industry will be a better use of resources and less expensive to the Federal Columbia River Power System than if additional reserves were acquired through

construction of additional facilities or purchase of power from other utilities. The investment capital required for new resources or cost of purchased reserves is saved. With a lower grade of power to industry, the reserves are used for productive purposes and are not idle until needed to meet firm loads. Only industries like aluminum reduction, ferrosalloys, and some chemicals can utilize this lower grade of power. Utilities cannot use this lower grade of power to serve residential, farm, commercial, and the usual (other than electroprocess) industrial loads.

In addition to the Federal Columbia River Power System saving the cost of new resources, additional revenue is received as a result of sale of power to industry that, in part, would be unsalable. Bonneville revenues from these industrial customers will total about \$2.5 billion over the 20-year term of the new contracts. If Bonneville did not serve the industrial loads under the new contracts, a substantial portion of the energy used by the industrial customers could be sold in other regions such as California and some in the Pacific Northwest region to replace generation utilizing fuel. However, such markets are not large enough to absorb the amount of energy available under all water conditions and more water would spill over the dams instead of generating valuable electric energy. We estimate that if just one-fourth of the industrial contract demand were not sold to industry in 1975-76, based on 94 years of water conditions, an average of 266,000 kilowatts would be wasted. With service to industry this energy will be used for production purposes and Bonneville will secure revenues from its sale.

The proposal will have additional advantages as follows:

- (1) The effect of obtaining reserves from industrial customers will enable BPA to charge lower rates than if equivalent reserves were provided by the usual procedure of idle resources until needed. BPA will secure revenue from the sale of such reserves to industry except when the reserves are needed for BPA to meet its other commitments.

(2) The enhanced utilization of existing resources reflects a conservation of energy resources and of capital which cannot go unnoticed under present and projected energy deficiencies and scarcity of capital. For example, the construction of a 1,000 megawatt generating unit in the early 1980's will require about \$1 billion.

(3) The proposed industrial contracts will enable BPA to maintain adequate operating reserves with a minimum of idle resources. The proposed Industrial Firm Power will enable BPA to a much greater extent call upon this power to meet unanticipated generation or transmission outages or swings on the Federal System as a result of disturbances on neighboring systems. Without the Industrial Firm Power, it would be incumbent upon BPA to reserve resources in a non-production status to meet such contingencies so that a reliable source of power could be supplied to BPA's preference customers.

The melding of BPA's need for adequate reserves to assure continued reliable service to its firm power customers with the unique ability of industrial customers to utilize a grade of power which anticipates interruption, presents BPA with an opportunity to provide the needed reserves while, at the same time, assuring a market for resources which might otherwise be wasted.

(4) New 20-year contracts will assure operation of these basic industries in the region at least through 1994. This is of considerable importance to the economy of the region.

Conclusion

The above advantages of replacing existing industrial contracts with the lower grade Industrial Firm Power can only be achieved by new 20-year contracts. The extension

of the term of the contract is the primary advantage to industries in giving up their existing contracts. The major advantage to BPA is to enable it to meet its commitments for a firm power supply to existing preference customers and thereby substantially reducing the probability of having to breach any contracts. Our preference customers will receive the advantage of a more reliable power supply from BPA at lower cost than the continuation of existing industrial contracts with Modified Firm Power. Also, the national economy will secure a better use of energy resources.

To achieve these advantages, I recommend new 20-year contracts with our industrial customers. We will review drafts of contracts with you shortly.

/s/ Bernard Goldhammer

SECOND AFFIDAVIT OF GERALD R. GARMAN

[Filed November 23, 1981]

In the United States Court of Appeals
For the Ninth Circuit

No. 81-7561

[Case omitted in printing.]

State of Oregon }
County of Multnomah } ss.

I, Gerald R. Garman, being first duly sworn on oath,
depose and say that:

My qualifications and involvement in the Regional Power
Act are set forth in my affidavit of August 31, 1981 which is
Exhibit B to our Motion for Temporary Relief.

OPERATE AS IF FIRM

In its brief, BPA claims that "operate as if firm"
requires them to change their priority for the sale of non-
firm energy to serve the interruptible first quartile of the
industrial purchaser load prior to preference customers.
This term refers to Bonneville's attempt to shift water
under the Pacific Northwest Coordination Agreement. It
has no meaning in the context of the priority for sale of
nonfirm energy.

BPA MISDEFINES RESERVES

On p. 32 of its brief, BPA states: "Each of these peti-
tioners must declare an assured energy capability for its
resources to the extent its resources fail to deliver the
declared assured energy capability, the petitioner, as a
member of the Pacific Northwest Power Pool, is obligated
by agreement to have reserves to provide the backup for its

own resources. (Section 2 of the Northwest Power Pool Coordinated Operation Principles and Procedures.)"

BPA should have quoted Section 2 which states: "Each system shall maintain sufficient capacity at all times to provide for changes in load that may be expected to occur under normal operating conditions. In addition, each system shall maintain an Operating Reserve equivalent to the sum of 5 percent of the total hydro generation and 7 percent of the total thermal generation being produced and utilized by a system. . . .". These reserves listed above are *all capacity reserves as defined in this same section*. They are *not energy reserves as BPA incorrectly stated in its brief*. This section highlights the preference customers' need for nonfirm energy to protect the firm energy resources.

BENEFIT OF NONFIRM ENERGY

Contrary to assertions by BPA and the industrial purchasers, BPA will not lose revenue if preference customers have first priority to nonfirm energy; rather, this priority increases revenues.

Under BPA's IP-1 rate to industrial purchasers, the net energy cost is 5.1 mils per KWH in the winter and 4.6 mils in the summer. Under BPA's NF-1 rate for nonfirm energy to preference customers, the minimum rate is 6.5 mils per KWH during the heavy load hours and 5.0 mils during the light load hours for solely hydro-generated nonfirm energy. These minimum rates apply only when hydro-generated energy is available, but will range as high as 17 mils per KWH when it is not. This 17 mill figure should increase dramatically in the future as thermal increases not only in price but in quantity on the BPA system. Thus, BPA will

secure less revenue from IP-1 sales of nonfirm energy to the first quartile of industrial purchasers than it would from the NF-1 rate for sale of nonfirm energy to preference customers.

/s/ GERALD R. GARMAN

Subscribed and sworn to before me this 20th day of November, 1981.

/s/ TARECIA M. CLINE

Notary Public for Oregon

My commission expires: 6-22-85

United States Court of Appeals
For the Ninth Circuit

No. 81-7561

[Case omitted in printing.]

OPINION

[Filed April 6, 1982]

Argued and Submitted January 6, 1982.

Decided April 6, 1982

Before: BROWNING, Chief Judge, and WALLACE and
BOOCHEVER, Circuit Judges.

This case concerns the allocation of power under the newly enacted Pacific Northwest Electric Power Planning and Conservation Act, Pub.L. No. 96-501, 94 Stat. 2697 (1980) (the Act). Public utility customers of the Bonneville Power Administration (BPA) contend that the power contracts offered to BPA's industrial customers violate those provisions of the Act that give preference to public utilities in the allocation of power. Because we find no explicit exception to the unambiguous provisions of the Act that preserve the longstanding preference given to public utilities, we find the contracts invalid.

FACTS

BPA is the federal agency that markets federal hydro-electric power in the Pacific Northwest. Congress passed the Act to resolve competing claims to low-cost federal power. *See, e.g.*, H.R. Rep. No. 976 (Part II), 96th Cong. 2d Sess. 26 (1980). The Act requires BPA to offer long-term contracts to all of its customers. BPA offered contracts to its direct service industrial customers (DSIs) on August 28, 1981. These contracts are the first to be offered under the Act and the first to be adjudicated.

BPA provides DSIs "Industrial Firm Power" which allows BPA to restrict its delivery of power to the DSIs for specified reasons. Each quartile, or fourth, of the DSI power is subject to different restrictions. The first quartile is served partially with nonfirm energy, the energy remaining after BPA has fulfilled its firm obligations. Nonfirm energy is the energy in excess of that which BPA can reliably plan on producing and is therefore provided only when such an excess exists.¹ Firm energy is the energy that BPA can reliably plan on producing and must be sufficient to serve BPA's firm loads. Firm loads are the power requirements that BPA must plan for and may not restrict.

Prior to the Act, BPA offered nonfirm energy first to the preference customers and then to the DSIs. Under the new contracts, BPA plans to offer nonfirm energy to the DSIs first. The preference customers challenge the contract provisions that effectuate this new method of allocation.²

¹BPA plans its future power resources on the assumption that during some periods the water levels used to generate power will be low or "critical." BPA plans on having at least the amount of power that it can produce at a critical water level and that power is therefore firm power. When the water level is greater than critical, the power generated from the excess water is nonfirm energy.

²Four provisions in the contracts effectuate this interpretation. Section 7(c) provides that sales will be made to the first quartile prior to other sales of nonfirm energy. Section 7(e) provides that the adjustments for energy already used by the first quartile may not be made for sales of nonfirm energy to preference customers. Section 8(a)(2) provides that BPA will not sell nonfirm energy if it can be used for the first quartile. Section 8(c)(9) provides that BPA will attempt to acquire additional energy before requiring DSIs to repay energy advanced to the first quartile.

ANALYSIS

I.

Applicable Standards

Section 9(e)(5) of the Act provides that suits to challenge final actions such as contract offers shall be brought in the United States Court of Appeals for the region. The original jurisdiction given this court by § 9(e)(5) raises procedural problems that will have to be resolved on a case-by-case basis. Because no factfinding is necessary in this case, we will treat it like a petition for administrative review. A myriad of variations may arise in suits brought under the Act, and we do not intend to bind the court to the procedures used in this case.

Section 9(e)(2) of the Act provides that the scope of review by this court of a sale of electric power is governed by the Administrative Procedure Act, 5 U.S.C. § 706. The Administrative Procedure Act specifies that in reviewing agency actions, a court shall decide all relevant questions of law, interpret statutory provisions, and determine the applicability of the statutory terms to agency action. The reviewing court must set aside agency actions that are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. *Id.* § 706(2)(A).

In interpreting the Act, we give substantial deference to BPA's construction of the statute because BPA is the agency charged with the Act's administration. *United States v. Rutherford*, 442 U.S. 544, 553 (1979). This deference is especially appropriate because BPA's interpretation is a contemporaneous construction of a statute by those with the responsibility for setting it in motion. *Udall v. Tallman*, 380 U.S. 1, 16 (1965); *Columbia Basin Land Protection Association v. Schlesinger*, 643 F.2d 585, 600 (9th Cir. 1981). Additional weight is given the agency interpretation when the agency administrators participated in drafting the legislation as they did here. *Zuber v. Allen*, 396 U.S. 168, 192

(1969). Our review is limited to whether BPA's interpretation of the Act is reasonable. *Columbia Basin*, 643 F.2d at 600. Only if BPA's interpretation is unreasonable may we conclude that BPA's contract offers violate the Act.

II.

The Preference

Giving all due deference to BPA's construction of the Act, we nevertheless find its interpretation unreasonable. We find that the explicit and longstanding preference retained in the Act controls rather than the ambiguous provisions relied upon by BPA to justify a change. Before examining the Act's legislative history and underlying purposes, we turn first to the express terms of the Act.

A. *Pertinent statutory provisions*

1. Preference provisions: Section 5(a) of the Act provides that:

All power sales under this Act shall be subject at all times to the preference and priority provisions of the Bonneville Project Act of 1937. . . .

At § 10(c), the Act further provides that:

Nothing in this Act shall alter, diminish, abridge, or otherwise affect the provisions of other Federal laws by which public bodies and cooperatives are entitled to preference and priority in the sale of federally generated electric power.

The Bonneville Project Act, 16 U.S.C. §§ 832 *et seq.*, requires that BPA give preference and priority to public bodies and cooperatives in selling power. 16 U.S.C. § 832(c)(a). Thus, §§ 5(a) and 10(c) of the Act explicitly reaffirm the preference to public bodies established by the Bonneville Project Act.

Preference provisions have been included in federal power acts since 1906. Fereday, *The Meaning of the Preference Clause in Hydroelectric Power Allocation under the Federal Reclamation Statutes*, 9 Env't'l L. 601, 610 (1979). BPA's allocation of power has been subject to the preference since the Bonneville Project Act was passed in 1937. It is undisputed in this case that BPA previously interpreted the preference provision to apply to nonfirm power as well as firm power. Thus, prior to offering the contracts now at issue, BPA allocated nonfirm power according to the preference after it had first allocated firm power according to the preference. BPA's pre-Act interpretation of the preference was consistent with this court's interpretation of a preference clause under an analogous statute. See *Arizona Power Pooling Association v. Morton*, 527 F.2d 721, 725 (9th Cir. 1975), *cert. denied*, 425 U.S. 911 (1976) (holding that a similar preference clause in the Reclamation Project Act of 1939, 43 U.S.C. § 485(h)(c), applied to sales of thermally generated electrical power).

Any modification of the preference, in view of its long history and clear reaffirmation in the Act, should be explicit. See generally *New England Power Co. v. New Hampshire*, U.S., 50 U.S.L.W. 4223, 4227 (February 24, 1982) (courts "have no authority to rewrite . . . legislation based on mere speculation as to what Congress 'probably had in mind'").

2. Basis for BPA's interpretation: BPA's interpretation is based on the assumption that § 5(d)(1)(A) of the Act requires giving the DSIs priority to nonfirm energy for their first quartile. Subsection 5(d)(1)(A) provides that:

The Administrator is authorized to sell in accordance with this subsection electric power to existing direct service industrial customers. *Such sales shall provide a portion of the Administrator's reserves for firm power loads within the region.* (emphasis added).

Section 3(17) of the Act defines "reserves" as the power needed to avert shortages for the benefit of firm power customers.³ To evaluate the BPA's conclusion, it is first necessary to consider the manner in which nonfirm energy is initially allocated.

The sale of nonfirm energy is contingent on availability. When sufficient nonfirm power is available, BPA provides it as needed to both the preference customers and DSIs. When, however, there is insufficient nonfirm energy to fill the needs of both types of users, the preference clause appears on its face to mandate, and, as previously interpreted by the BPA, did require, that the nonfirm energy needs of the preference customers be met before the nonfirm needs of the DSIs. Application of the preference in this manner interrupts the flow of nonfirm power to the DSIs. BPA and the DSIs argue that this process violates § 5(d)(1)(A) because it makes the DSI's nonfirm power a reserve for the preference customers' nonfirm needs.

The BPA and DSIs' reasoning is flawed. Although applying the preference may deprive the DSIs of nonfirm power, that does not constitute using reserves for nonfirm loads. This so-called interruption results from insufficient energy to make the initial allocation of nonfirm power to the DSIs, not from the use of energy already allocated to the reserve. It is meaningless to speak of interrupting the flow of power that has not yet been allocated. No customer has an expectation of receiving any nonfirm power until BPA allocates it. The power allocated to the DSIs' first quartile serves as a reserve for firm loads because it may be interrupted on a few moments notice if, for example, the demand

³BPA contracts to provide the DSIs with power. If, however, a power plant outage occurs or energy use peaks, for example, so that BPA could not meet its firm obligations, BPA would interrupt its service to the DSIs and use the power then available to serve its other loads. In this way, the power allocated to the DSIs serves as a reserve.

for firm power peaks. *See* note 3, *supra*. It is a non sequitur to conclude from the fact that the reserve cannot be used for nonfirm needs that the nonfirm energy cannot initially be allocated to the preference customers in accordance with the preference.

The only reasonable interpretation of § 5(d)(1)(A) that is consistent with the preference is that the initial allocation of nonfirm power is no less subject to the preference than firm power. Nonfirm power does not become part of the reserve in the DSI load unless there is nonfirm power in excess of the amounts needed by the preference customers. When there is no surplus over the amount needed by the preference customers there can be no provision to the DSIs and, thus, no reserve created. When, however, there is sufficient energy to provide nonfirm power to both the preference customers and DSIs, the nonfirm power allocated to the DSIs becomes a reserve for firm loads. If, for example, a preference customer's firm load peaked above BPA's firm power resources so that BPA's obligation exceeded its ability to furnish firm power, BPA would meet the peak demands with energy from DSIs' reserves. This straight-forward construction is preferable because it harmonizes what would otherwise be conflicting provisions of the Act. *See generally Erlenbaugh v. United States*, 409 U.S. 239, 244, 45 (1972); *Clark v. Ubersee Finanz-Korp.*, 332 U.S. 480, 488-89 (1947).

Moreover, even if § 5(d)(1)(A) could be construed as creating an exception to the preference, BPA's interpretation is unreasonable given the clear preference provisions to the contrary. Section 5(d)(1)(A) specifies only that the reserve shall be used for firm power loads; it says nothing about the provision of nonfirm energy. To accept BPA's interpretation, we would have to infer that the interruption of the DSI nonfirm power that would result from the application of the preference when there is insufficient

power for all users is equivalent to using reserves for nonfirm loads. We would also have to infer that any allocation of nonfirm power that might interrupt the flow of nonfirm power to the DSIs is not subject to the preference. It is unreasonable to assume that Congress intended to create such a significant exception to the preference through the indirect device of a provision referring to reserves.⁴ We discern no basis in the explicit preference provisions of the Act for differentiating between the preference accorded nonfirm and firm power. We believe that if Congress had intended to override its twice-expressed and explicit preference mandate it would have spoken more directly.

Although the language of the Act appears clear, and thus controlling, we briefly examine the Act's history and

⁴BPA and the DSIs argue that BPA informed Congress of its proposed interpretation of the Act while the Act was still pending and that, in passing the legislation, Congress accepted BPA's interpretation. We rejected a similar argument in *Arizona Power Pooling*, *supra*, where the agency authorized to allocate federal power argued that Congress had indirectly "approved" an exception to the preference through actions it had taken in regard to annual appropriations for the project at issue in that case. Although it was undisputed that Congress had taken certain actions in passing appropriations that supported the agency's decision not to sell interim power to a preference customer, this court concluded that:

[t]his fact in and of itself does not justify the inference of congressional approval of purchase negotiations that were allegedly conducted in violation of the preference clause. 527 F.2d at 726. The court went on to note that nothing in the record or legislative history indicated that Congress was aware that its actions on appropriations would be construed to affect preference rights. *Id.*

Similarly, in the present case, there is no more indication that Congress was aware that BPA's interpretation would create an exception to the preference than there is that Congress intended to create such an exception through the indirect device of the reserve provision. Precise knowledge of the agency position is necessary to a finding that Congress ratified it. *Id.*

purpose to see if they are consistent with what appears, on the Act's face, to be Congress' clear intent.

B. Legislative History

The legislative history does not provide clear support for either side. Thus, although the preference to public utilities is explicitly recognized,⁵ we acknowledge that there are also statements supporting BPA's interpretation.⁶ It is unfortunate that the legislative history fails to give a clearer indication of Congressional intent. The inconsistent

⁵The House Committee of Interior and Insular Affairs stated in its Report "it is not, however, a purpose to interfere in any way with, or modify the statutory rights of preference customers either within or without the region." H.R. Rep. No. 976 (Part II), *supra*, at 26. See also *Id.* at 34. The House Committee on Interstate and Foreign Commerce responded in its report to concerns that the Act would change the meaning or applications of the preference. It stated that it did not want to undo nearly 80 years of history and that specific provisions were designed to protect the entitlement of preference customers to the full Federal base system. H.R. Rep. No. 976 (Part I), *supra*, at 26.

⁶Support for BPA's position can be found in Part II of the Report. It states that:

Approximately 25 percent of the DSI load is to be treated as a firm load for purposes of resource operation . . .
H.R. Rep. No. 976 (Part II), *supra*, at 48. The quartile referred to is the first quartile. Appendix B to the Senate Report provides that the first quartile:

would be served with resources which are in excess of critical planning amounts but operated to meet the entire DSI load as if it were firm.

S.Rep. No. 272, 96th Cong. 2d Sess. 59 (1980). The following sentence in the appendix to the Senate Report, however, indicates the ambiguity in Congress' direction to treat the first quartile as firm. It provides:

The operation of the System to carry out this purpose results from treating as a firm load the maximum amount of the DSI load (not all of which can be covered under critical streamflow planning), to the extent that this maximum load can be met in the initial period of the PNW Coordination

character of the legislative history is reflected several places in the Act, leading inevitably to burdensome resort to the courts for interpretation.

C. Purpose of the Act

Congress intended to achieve several purposes in the Act. It primarily intended to determine how federal power should be allocated and to give BPA authority to acquire power resources. *See, e.g.,* H.R. Rep. No. 976 (Part I), *supra*, at 27. In its allocation of power, Congress clearly manifested its intention to retain the preference clause. *Id.* The purpose of the preference is to give public bodies the benefit of public power, and to provide low-cost power to the greatest number of consumers. *Fereday, supra*, at 604, 632-33. Congress also intended to provide low-cost power to residential consumers of private utilities. H.R. Rep. No. 976 (Part II), *supra*, at 34-35.

To effectuate these purposes, the Act contemplates that the DSIs will pay rates sufficiently high to cover BPA's

Agreement Critical Period while protecting firm loads against the worst historical streamflow and maintaining an ability to restrict an equivalent amount of the DSI loads in the later periods (without provisional or advance energy being made available for this amount of the DSI load).

Id. The above-quoted sentence refers to a plan called Firm Energy Load Carrying Capability by which BPA borrows power from future years on the probability that there will be greater than critical water levels. The sentence indicates that treating the DSI load as firm means using only this plan to meet the DSIs needs. This is particularly evident in the provision that BPA need not supply the amount of power borrowed from future years if the water levels are low.

The reference to "treating the DSI load as firm in the operation" is ambiguous because the first quartile cannot be treated as firm entirely. Unlike firm power, it is interruptible and subject to priorities. If the first quartile does not have all the attributes of firm power in the context of operations, the phrase "treat as firm" does not indicate what firm attributes the first quartile has.

cost of acquiring new resources and to subsidize the sale of low-cost power to residential customers of private utilities. The DSIs argue that the assurance of power to their first quartile was a necessary inducement for them to enter the contracts requiring them to pay significantly higher rates. We disagree. Congress provided an ample incentive for the DSIs to enter the new contracts. Many of the DSIs' prior contracts would have expired soon after the Act was passed and those DSIs would have had to pay higher rates for whatever replacement power they could find after the expiration of their contracts. H.R. Rep. No. 976 (Part I), *supra*, at 28. The primary incentive for the DSIs to enter the contracts was the longterm security they gained from the new twenty-year contracts.⁷

Although there is no case authority directly on point, *City of Santa Clara, California v. Andrus*, 572 F.2d 660 (9th Cir.), *cert. denied*, 439 U.S. 859 (1978) is instructive on the purposes and proper interpretation of a preference clause. In *Santa Clara*, the Secretary of the Interior, acting through the Bureau of Reclamation, "banked" power produced pursuant to the Reclamation Project Act of 1939 (43 U.S.C. §§ 375a, 387-89, 485 *et seq.*) with a non-preference customer instead of selling it directly to a preference customer. The Secretary argued that the arrangement was designed to enable him to supply the future needs of

⁷Although we ultimately hold for the preference customers, we note that we do not find persuasive their argument that BPA's interpretation is unreasonable because it provides a disincentive for them to build new power facilities. The incentives that Congress provided preference customers for constructing power facilities are that: (1) they can receive credit on their current power bill for the cost of constructing facilities that reduce BPA's obligation to acquire resources (Act at § 6(h)); or (2) they can sell the capacity to BPA at a reasonable price while paying low federal rates for power (Act at §§ 6(a)(2), 6(i)(2), 7(b)(1)). Congress, the body authorized to do so, provided ample incentives, irrespective of the preference clause's application to nonfirm power.

selected preference customers. 572 F.2d at 669. This court held that the provisional sale of power to a non-preference customer when a preference customer is ready and willing to buy it contravened the purpose of the preference because the non-preference customer would profit from low-cost power at the expense of the preference customer. *Id.* at 670-71. Although the court recognized that the ultimate goal of the Secretary's scheme was consonant with the preference clause, it nevertheless found that the interim effect was inconsistent with the preference clause, and, therefore, held the scheme invalid.

The contention in the present case that the sale of non-firm energy to DSIs serves the preference clause by creating reserves and earning revenue that can reduce the rates of all preference customers is answered by *Santa Clara*. BPA's policy may serve the preference clause, but the immediate effect, like that in *Santa Clara*, is antithetical to preference rights, and, therefore, is not consonant with the preference clause.* The fact that BPA's policy may enable it to profit more from selling the nonfirm energy to the DSIs and that all of its customers would thereby benefit does not persuade us that its interpretation

*BPA's reliance on *Volunteer Electric Cooperative v. Tennessee Valley Authority*, 139 F.Supp. 22 (E.D. Tenn. 1954), *aff'd mem.*, 231 F.2d 446 (6th Cir. 1956) is misplaced. In *Volunteer*, TVA sold directly to an industrial customer instead of allowing its preference customer to serve the industry and gain the profit. The court held that TVA could serve the industry directly because the benefit would be shared by all customers, not just the one utility, and that that approach served the Act's purpose to provide low-cost power. The present case is not one in which a preference customer profits from selling power acquired through the preference to the industries who also want the power. Here, the preference customers want the low-cost power for their customers. To the extent that *Volunteer* holds that the power agency may bypass the preference if the bypass benefits all of its customers, *Volunteer* is contradicted by *Santa Clara*.

is reasonable. As explained in *Santa Clara*, the purposes of the Act and its preference clause are best served by an interpretation that ensures the sale of power to preference customers. BPA's interpretation to the contrary, without explicit Congressional direction, contravenes the purposes of the preference clause.

CONCLUSION

Congress strongly reaffirmed in the Act the longstanding preference given to public bodies in the sale of federal power. The Act contains no explicit direction from Congress to create an exception to the preference with respect to the provision of nonfirm power to DSIs. We hold that BPA's interpretation is unreasonable because it contravenes the longstanding preference explicitly continued under the Act and is without express statutory support.⁹ Accordingly, we remand the matter to BPA with directions for further action consistent with this opinion.

⁹Because we find that the priority given the DSIs for nonfirm power violates the preference provisions of the Act, we do not reach two remaining issues. We need not determine whether the new contracts violate § 5(d)(1)(B) by providing the DSIs more power than they were entitled to under their 1975 contracts. Similarly, whether BPA failed to follow required procedures in adopting its interpretation of the Act is moot in light of our holding that the interpretation is unreasonable.

United States Court of Appeals
For the Ninth Circuit

No. 81-7561

[Case omitted in printing.]

[Filed Sept. 7, 1982]

ORDER

The panel in the above-entitled case has agreed to amend the Opinion as follows:

1. Insert new footnote at page 6, line 32, stating:

4. We find no support for the contention that § 5(d)(1)(B) guarantees the nonfirm power needed to serve the DSIs' first quartile. Section 5(d)(1)(B) expressly links the DSIs' present allocation to their entitlement under the 1975 contracts. It is undisputed that under the 1975 contracts the DSIs received nonfirm power only after the preference customers filled their nonfirm needs. Thus, subsection (B) does not entitle the DSIs to nonfirm power for the first quartile under the contracts now at issue. Moreover, § 5(g)(7) does not alter this conclusion because it does not grant the DSIs any greater entitlement than what they received under the 1975 contracts.

2. Renumber all subsequent footnotes and signals.
3. Change footnote 10 (old footnote 9) to read:

10. Because we find that the priority given the DSIs for nonfirm power violates the preference provisions of the Act, we need not determine whether BPA failed to follow required procedures in adopting its interpretation of the Act.

United States Court of Appeals
For the Ninth Circuit

No. 81-7561

[Case omitted in printing.]

[Filed Sept. 27, 1982]

ORDER

Before: Browning, Wallace and Boochever, Circuit Judges:

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed.R. App.P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

Schedule of Events
Leading to the Offering of Contracts
(5/81 - 6/25/81)

Volume VI
Pages 1419 thru 1809

Contract Official Record
1981
Department of Energy
Bonneville Power Administration

[1475]

Department of Energy
 Bonneville Power Administration
 Notice of
 Draft Prototype Power Sales Contracts
 Interpreting Policy Provisions
 of Pacific Northwest Electric
 Power Planning and Conservation Act:
 Publication of Summary of
 BPA's Proposed Contract Provisions
 and Request for Public Comment

* * *

[1490]

III. *Discussion of Contract Elements—DSI Contracts.*

A. *Duration of Contract and Related Matters.*

1. *Term.* All contracts will be effective on the date agreed upon among the parties and will terminate approximately 20 years later on June 30, 2001, consistent with legislative history and BPA's interpretation of the language of Public Law 96-501 referring to "long-term" contracts. BPA has proposed the 20-year term for these power sales contracts, as it has historically, based on the longest term permitted under the Bonneville Project Act of 1937. This affords BPA the greatest opportunity to engage in prudent long-term planning. Some public comment has suggested that the 20-year term could delay implementation of alternative power sales policies.

2. *Effective Date.* Proposed by BPA to be July 1, 1981, but may not be later than October 1, 1981.

3. *Status of Existing Contracts.* BPA proposes termination of existing contracts. The DSIs prefer that existing contracts not be terminated, but that deliveries be made pursuant to the terms of the new contracts.

4. *Existing Liabilities.* Any liabilities under current power sales and operating agreements will be preserved until satisfied.

5. *Follow-on Contracts.* BPA will not be obligated to offer a follow-on contract. However, BPA and DSIs would establish a mechanism for assessing mutual desire and ability to execute such contracts. Further, DSIs prefer that BPA acknowledge an obligation to achieve and maintain load/resource balance throughout the contract term. BPA acknowledges its statutory obligations to acquire sufficient resources to meet its contractual obligations.

[1491]

B. *Class of Power.* The contract would be for a unified class of Industrial Firm Power (IF) and for amounts of Auxiliary Power, subject to restriction by BPA and curtailment by the customer on the terms and conditions set forth in the contract.

C. *Amount of Power.*

1. *Generally.*

a. The Regional Act entitles each DSI to the amount of power to which it is presently entitled under the IF contracts, including technological improvement allowances for purposes other than plant expansion.

b. The new DSI contracts will contain demand levels known as "Contract Demand" and "Operating Demand;" a contract demand for Auxiliary Power will also be included. The Contract Demand and Operating Demand may be identical for some companies. Contract Demand would represent the maximum amount of power each DSI is entitled to receive from BPA under the new contract. Operating Demand would represent each company's operating level actually achieved or in the process of being attained. Adequate notice would be required for increases or decreases in operating levels that result in operating levels less than or equal to Operating Demand. Notice for certain increases in Operating Demand would be iden-

tical to notice provisions of utility contracts (amount of notice is a function of the size of increase). Technological Improvement Allowances (TIA), if granted, would increase both Contract Demand and Operating Demand by the amount of the TIA.

2. *Contract Demand.*

a. Each DSI contract would contain a specified Contract Demand level.

b. Contract Demand for each DSI will be the sum of:

(1) Contract demand in the current IF contract;

(2) Authorized Increases granted in the past and incorporated or scheduled to be incorporated in the current IF contract;

(3) Additional Power actually purchased under current contracts; and

(4) Technological Improvement Allowances that are granted (see Section 4 below).

3. *Operating Demand.*

a. Each DSI contract would contain a specified initial Operating Demand level and scheduled increases thereof, reflecting the company's recent operating experience, announced plans, and current plant capability.

b. Generally, matters such as billings, restriction amounts and allocations of Advance Energy and IRE (see below) would be based on Operating Demand rather than Contract Demand.

c. No notice is required for increases in Operating Demand specified in the Contract. Each DSI may otherwise increase its Operating Demand up to the limit of its Contract Demand upon appropriate notice.

4. *Technological Improvement Allowances (TIA's).*

a. *Availability.* As in existing contracts, TIA are for purposes other than plant expansion.

b. *Amount.* The total TIA pool is limited to one percent per year of the total initial Contract Demand, cumulated and carried forward to the extent not used from July 1, 1978.

[1492]

c. *Eligibility.* Technological Improvements that (i) meet the contractual criteria; and (ii) are made in the future or by written notice since July 1, 1978, will be eligible. Requests for Technological Improvements not immediately eligible for service as Industrial Firm Power will be served in the interim by Auxiliary Power.

d. *Allocation Among DSIs.* The contract will contain a mechanism for allocating TIA among DSIs in the event that requests in any year for the following 3-year period exceed the amount available for that period, with certain allocation priorities for those DSI's who have not previously been granted their proportionate share of available TIA amounts.

e. *Notice.* Same as for increases in utility contracts, except that shorter notice period may apply if the TIA is required by the DSI to comply with a governmental order (e.g., pollution control).

f. *Effect.* TIA that are granted will increase both Contract Demand and Operating Demand, and will decrease the Auxiliary Demand, by the amount of the TIA.

D. *BPA Restriction Rights.*

1. *Generally.*

a. The DSI contracts are required to provide reserves to protect BPA's firm obligations. These reserves are provided through contract rights to interrupt or withdraw power otherwise delivered to the DSIs. The restriction rights may not be exercised for any purpose other than the protection of all BPA firm obligations. Except to the extent of such restriction rights, BPA's contractual obligations to

the DSIs are generally identical to its obligations to other customers.

b. For purposes of quantifying specific restriction rights, each DSI Operating Demand is divided into four "quartiles" of equal size "subject to special operating circumstances." Different restriction rights apply to different quartiles. Additional restriction rights apply to Auxiliary Power.

c. The contracts will recognize that some flexibility in adjusting restriction rights over time will be desirable, and that such adjustments may be made by mutual agreement of the parties. In addition, the continued need for periodic Operating Agreements will be acknowledged.

d. Reserves are categorized as planning or operating reserves, depending generally on the purpose of the particular reserve, the duration of the restriction, and the type of shortage that "triggers" BPA's need for and right to exercise the restriction right.

2. *System Stability and Forced Outage.*

a. These reserves will be similar to existing DSI contract provisions. The main difference is that BPA seeks, in place of the present 5-minute limit on dropping 100 percent of the DSI load, a longer period (15-45 minutes). BPA is currently assessing its need for, and the DSI's their ability to withstand, this longer interruption.

b. These reserves are provided by the following specific restriction rights:

(1) *100 Percent Load Drop.* Extension of time limit from 5 minutes to 15-45 minutes is currently being investigated (see above).

(2) *50 Percent Load Drop.* This applies to the DSI loads operating at the time of restriction. A restriction is of up to 2 hours' duration each time employed. The accumulation of all such [1493] restrictions cannot exceed in kilo-

watthours in any calendar year each DSI's Contract Demand multiplied by 50.

(3) *25 Percent Load Drop.* This use applies to the second quartile of the Operating Demand. The accumulation of all such restrictions cannot exceed in kilowatthours in any calendar year each DSI's Contract Demand multiplied by 375.

3. *Top Quartile Operating Reserve.*

a. BPA may interrupt a portion of the DSI load, not to exceed 25 percent of the Operating Demand plus the Auxiliary Power, at any time, for any reason, and for any duration. Interruptions may be for capacity or energy or both. Special arrangements may apply when the first quartile is served with DSI firm energy borrowed from a later portion of a critical period.

b. As much notice of interruption as possible under the circumstances will be given.

c. See also "Operations In Lieu of Restriction", below.

4. *Second Quartile Reserves.*

a. The parties are presently negotiating the extent of the expanded reserve provided by this quartile. The DSIs maintain that this reserve should be only for resource delay and initial operating problems. BPA maintains that this reserve should also be used for failure of existing resources. It is agreed that this quartile will provide a reserve to protect BPA's other firm obligations.

b. Currently in disagreement are the following:

(1) *Inability of a Resource to Maintain Designed Capability Once Attained Initially.* BPA wants the second quartile reserve to be available not only to protect firm loads against the delayed completion of planned resources or the failure of such resources to achieve design capability but also to protect firm obligations against the contingency of the loss of capability of such resources once commercial

status is attained. The DSIs disagree, particularly if the "loss" is discretionary or volitional, and feel that all loads in the region (including the DSIs) should bear this risk equally in such event.

(2) *Coverage of Existing BPA Resources.* In addition to covering planned resources, BPA wants the reserve to be available in the event an existing resource loses actual capability; the DSIs take the position that only resources "implemented or acquired" by BPA under the Regional Act are to be covered. BPA agrees that such reserves for resources which attained commercial operation shall not be used because of shutdowns incurred under governmental orders.

(3) *Expansion of Second Quartile Reserves.* BPA wants to be able to restrict deliveries to the second quartile on short notice (30-45 days) during the operating year in which: (A) a long-term forced outage occurs, (B) firm loads cannot otherwise be served, (C) replacement energy cannot be purchased at a reasonable price, (D) first quartile reserves are unavailable and (E) forced outage reserves are insufficient. The DSIs maintain this would establish the second quartile as an operating reserve for energy purposes, which BPA states it needs. The DSIs maintain that this is a new proposal not contemplated by the Regional Act. The DSIs believe the intent of the Regional Act is to treat the second quartile as an energy planning [1494] reserve only, with notice of possible restriction therefor being given only prior to the Contract Year in which the restriction may occur. BPA believes that there is flexibility for expanded reserves.

c. The parties are currently considering provisions to attempt to resolve the disagreement expressed in subsections (a) and (b) above. The provisions would modify the proposed restriction right in the following manner:

(1) Provide assurances that the right will be exercised only in circumstances in which BPA would otherwise be unable to carry its firm obligations.

(2) Place a reasonable durational limit (or other form of limit) on the exercise of the restriction right, so that a forced outage that cannot be cured (or mitigated by purchases) will become within a reasonable time a regional problem rather than a problem for the DSIs alone. BPA proposes 180 days as a reasonable durational limit in the first Contract Year that the outage occurs, but maintains DSIs will continue to provide reserves for a period up to 10 years;

(3) Exclude from coverage by the restriction right certain types of events imposed by governmental action or which are voluntary, volitional, or otherwise discretionary (*e.g.*, a regional decision to shut down otherwise operable generating units); and

(4) Provide for contractual oversight provision with resource owners and operators to assure prudent operation of resources in order to minimize the risk of this restriction right being exercised.

d. The top quartile operating reserve and the DSI forced outage and stability reserves will be available for any contingency not covered by the second quartile reserve, including unanticipated growth of regional firm loads. The second quartile is not exposed to the extent the region simply fails to plan sufficient resources, but rather to the extent that certain planned resources are not available.

e. BPA recognizes its obligation to acquire resources pursuant to the Regional Act, on a reasonable schedule, to make up for any projected deficit.

E. BPA Obligations and Operations in Lieu of Restriction.

1. *Generally.* BPA is obligated to treat three quartiles of the DSI Operating Demand as a firm load for purposes

of both resource planning and operation (subject to the restriction rights noted above). BPA is obligated to treat the DSI top quartile as if it were a firm load for purposes of resource operation, but not for purposes of resource planning (subject to the restriction rights noted above). BPA may restrict deliveries to DSIs only for the purpose of making firm power sales to other customers. BPA will use techniques such as Advance Energy or shaping of Firm Energy Load Carrying Capability to borrow DSI firm energy from one time period for use in an earlier time period, subject to additional restriction rights by BPA if repayment of the borrowed energy is necessary to enable BPA to meet its firm obligations.

2. *DSI Load Obligations and Operations.* Because the DSIs' second quartile is a firm load for purposes of resource planning as well as operation, BPA will not restrict deliveries to the DSIs' second quartile unless BPA is unable to meet its total firm obligations in actual operation, including through the purchase of available power at reasonable price. BPA maintains that at present [1495] the price of power produced at single-cycle combustion turbines is the reasonable limit. The reasonable limit is expected to vary over time based on market conditions and other circumstances.

3. *Advance Energy.* Among the specific points that will be included in the DSI contracts with respect to Advance Energy are these:

a. Except for deliveries of Auxiliary Power, Advance Energy may be available for any portion of the DSI load that is subject to restriction, within the limits of available amounts.

b. Generally, Advance Energy will be pro-rated among the DSI on the basis of Operating Demands.

c. BPA proposes that if a DSI curtails plant load, it individually may refuse to accept Advance Energy, in whole or in part; the DSIs do not agree that Plant load must be curtailed to refuse acceptance of Advance Energy.

d. The obligation to repay Advance Energy will be discharged in proportion to the refill of the reservoirs at which Advance drafts were made, or to which Advance Energy was transferred, based on energy content of available storage at such reservoirs (taking flood control limits into account).

4. *Operating Agreements.* As is the case in the 1980-81 and 1981-82 Contract Years, BPA and the DSIs may from time to time enter into operating agreements for operations in lieu of restriction in the event the power sales contract does not provide for a particular operating condition. Such operations are secured by BPA rights to restrict in a later time period, if necessary, portions of the DSIs load that would not otherwise be subject to restriction under the terms of the DSIs contracts.

F. *Voluntary Curtailment by the Customer.* Each DSI may curtail its plant load up to the amount of the top quartile, plus Auxiliary Power, generally without a Demand Charge.

G. *Voluntary Termination of Contract.* The DSI prefer, as in section 11(c) of the existing DSI General Contract Provisions, that any DSI may terminate its BPA contract after a rate increase, subject to paying the cost of any BPA facilities used to deliver power to that DSI load. BPA has proposed that a DSI may terminate under such circumstances if the DSI reimburses BPA for the unrecoverable cost of pertinent facilities or resources acquired to serve the DSI, and of residential exchange shortfalls.

H. *Miscellaneous.*

1. *Service From Other Sources.*

a. If, with BPA's consent, any DSI transfers to a BPA utility customer any portion of the load that BPA is already serving directly, the Contract Demand and Operating Demand of that DSI will be reduced by the same amount.

b. As required by sections 9(i)(1) and (2) of the Regional Act, BPA will continue to act as agent for the DSIs in acquiring, at the request and expense of the DSIs, industrial replacement energy (IRE) and in disposing of such IRE at the request and expense of each DSI. BPA will prescribe the terms and conditions of IRE transactions for the purpose of assuring each DSI an opportunity to participate in such acquisitions and dispositions. In addition, BPA proposes (outside the power sales contract) that all acquisitions of IRE and other non-Federal energy by the DSIs shall be subject to preemption by BPA [1496] if the IRE has not already been delivered or advanced, and if it is needed to enable BPA to meet its firm obligations, including the DSIs second quartile; the DSIs have not agreed to this.

c. The DSIs propose that circumstances, if any, under which a DSI may acquire resources of its own to provide service to all or a portion of the load that BPA may interrupt should not be decided as part of the present contract negotiation. The DSIs maintain that this question should be deferred for resolution in the context of specific resource proposals if any are later advanced. BPA agrees that the matter can be deferred.

2. *Nongeneric Items.*

- a. Alumax special provisions.
- b. Furnace reline provision.
- c. Rate and Restriction provisions for Hanna.
- d. At-site provisions for Anaconda and Martin Marietta.

IV. Discussion—General Contract Provisions. The General Contract Provisions (GCPs) contain general provisions associated with the power sales contracts for utilities and direct-service industries. Specific information covered by these provisions include billing provisions, provisions for adjusting wholesale power rates, engineering requirements for points of delivery and many others.

Schedule of Events
Leading to the Offering of Contracts
(8/27/81 - 9/3/81)

Volume IX
Pages 2352 thru 2639

Contract Official Record
1981
Department of Energy
Bonneville Power Administration

[2355]

Department of Energy
Bonneville Power Administration
Notice of Final Action Concerning
Power Sales and Residential Exchange Contracts
Required by Pacific Northwest
Electric Power Planning and Conservation Act

AGENCY: Bonneville Power Administration (BPA), Department of Energy

ACTION: Notice of final action concerning power sales and residential exchange contracts, including verbatim terms of the contracts, summary of major comments provided by the public, and BPA evaluation of the public comments.

SUMMARY: The Pacific Northwest Electric Power Planning and Conservation Act (Regional Act or Public Law 96-501) requires in section 5(g) that BPA simultaneously offer, within 9 months of the date of enactment (September 5, 1981), long-term power sales contracts to (1) existing public body and cooperative customers and investor-owned utility customers; (2) Federal agency customers; (3) electric utility customers participating in the residential exchange; and (4) the direct-service industrial customers. On Friday, August 28, BPA took final action concerning these contracts by sending final power sales and residential exchange offers to eligible entities in the Pacific Northwest. This action fully completed BPA's development of these contracts and satisfied BPA's statutory obligation to negotiate and offer these contracts pursuant to the requirements of section 5(g). Executed contracts may be amended in the future upon mutual agreement of the parties.

BPA published summaries of its draft prototype power sales and residential exchange contracts and a draft report on the environmental considerations associated with the contracts on June 11, 1981, (46 FR 31238). This Notice

summarizes the major issues identified by the public and BPA's evaluation of the public comments related to those issues which were received following publication of the draft prototype contracts and during earlier opportunities for public review and comment (46 FR 18331 and 46 FR 23287). This Notice also includes verbatim, in Attachments 1-3, the terms of the prototype Utilities Power Sales Contract, the prototype Residential Exchange Contract, and the prototype Direct-Service Industries Power Sales Contract, including the General Contract Provisions. Certain exhibits to the contracts have not been published because they have been previously published in the **FEDERAL REGISTER** or are included in this Notice only once where they are incorporated into more than one contract. References to where these exhibits can be found are included in the contracts where they are normally located.

FOR FURTHER INFORMATION, CONTACT: Donna L. Geiger, Public Involvement Coordinator, Bonneville Power Administration, P.O. Box 12999, Portland, Oregon 97212, 503-234-3361, Extension 4261. BPA maintains toll-free lines for the use of persons within the region. Oregon callers outside of the Portland area may use the toll-free line, 800-452-8429; for callers from Washington, Idaho, Montana, Utah, Nevada, Wyoming, and California: 800-547-6048. Messages received after normal business hours (after 4:30 p.m. and before 7:30 a.m.) may be recorded on the toll-free lines. [2356]

SUPPLEMENTARY INFORMATION: The Regional Act requires that BPA simultaneously offer, within 9 months of the date of enactment, long-term power sales contracts to: (1) existing public body and cooperative customers and investor-owned utility customers; (2) Federal agency customers; (3) electric utility customers participating in the residential exchange; and (4) the direct-service industrial customers. From the outset, BPA recognized that the public should be and wished to be involved in the implementation of the Regional Act and could play an important role in

the negotiation of the power sales contracts. On December 1, 1980, BPA initiated its public involvement under the Regional Act by mailing to 8,000 addressees in the region a summary of the Regional Act, a series of questions and answers relating to the Regional Act, a summary of the tasks which BPA planned to undertake for implementing the Regional Act, and an announcement of the availability of toll-free numbers for questions. The Administrator announced in that mailing that four technical meetings would be held in Portland in mid-December for interested parties (investor-owned utility customers; direct-service industrial customers; preference customers; and Federal agency customers; and environmental and consumer organizations). The purpose of these meetings was to explain the Regional Act and the actions which BPA must undertake prior to adoption of an initial regional power plan by the Pacific Northwest Electric Power and Conservation Planning Council (Regional Planning Council) established by the Regional Act.

On December 5, 1980, the Administrator sent letters to each customer group and to other interested individuals and groups telling them where and when the technical meetings would be held. Principal environmental and public interest groups, local government bodies, and Northwest Indian tribes were included in this mailing.

On December 31, 1980, the Administrator sent informational material regarding the upcoming negotiations to all customers and technical meeting attendees. The material included lists of the contract types as well as the task teams BPA proposed to negotiate the contracts.

On January 5, 1981, BPA issued a press release announcing a series of 26 town hall meetings to be held throughout the region from January 8 through 22. (An additional meeting was scheduled later when a particular community requested that one be held in that locality.) BPA placed advertisements concerning the meetings in regionwide

newspapers in order to reach the maximum number of interested people. The meetings were designed to explain the major provisions of the Regional Act to the public and especially local government officials. They were conducted by BPA Area office and District office personnel. The Administrator stated that the town hall meetings were one way BPA would keep the public informed and involved during the policymaking process.

On January 12, 1981, BPA announced to its customers that an organizational meeting for contract negotiations pursuant to the Regional Act would be held on January 23 in Portland. On January 14, a direct invitation to attend the meeting was also extended to interested individuals through the press and mailings. On January 20, BPA issued a press release to further alert the public on the upcoming organizational session. This meeting preceded the start of actual negotiations. Its main purpose was to develop the [2357] organizational framework within which negotiations would be conducted and to determine the mechanics of the development of the specific prototype contracts. BPA invited its customers to select representative teams to attend the meeting.

From January 23 to May 29, negotiations between BPA and its customers were conducted at BPA headquarters in Portland, Oregon. Early in January, BPA's Public Involvement office established a weekly meeting calendar. The calendar included conferences, seminars, and other meetings including contract negotiation sessions and was sent to the public on request. Similar information was contained in calendars maintained and distributed throughout the region by the Public Power Council, the Pacific Northwest Utilities Conference Committee, and the Direct-Service Industrial Customer office. The section of the calendar dealing specifically with the contract negotiation sessions was reproduced and posted every Monday in the BPA Headquarters lobby. It was also included in the weekly mailings

of negotiation materials to individuals who requested these materials.

Issues regarding the power sales and rural-residential exchange contracts were discussed and clarified in the negotiating sessions. Interested individuals were free to observe the negotiation sessions between BPA and participating parties, and to submit oral and written comments during and at the conclusion of individual negotiating sessions. Upon request, BPA each week furnished to the public copies of all documents distributed at the sessions.

On March 25, 1981, BPA published a notice in the **FEDERAL REGISTER** (46 FR 18331) titled "Notice of Public Participation in Negotiation of Initial Long-Term Power Sales and Certain Other Contracts." The notice outlined the approach BPA was taking to include the public in the contract negotiation process and restated the availability of the meeting calendar so that interested parties could attend the negotiated sessions. It also invited interested individuals to request weekly mailing of documents distributed at the negotiation sessions so that individuals unable to attend some or all of the negotiation sessions would still be able to participate. This invitation to participate in the sessions was also mailed directly to individuals and groups who had expressed an interest.

On April 8, 1981, in response to urging from fisheries and environmental groups for expanded public involvement, BPA announced its plans to hold two evening meetings (one west of the Cascades and one east of the Cascades) where the Acting Power Manager would receive advice and accept comments from interested people on contract issues identified by them. The letter directed to "Public Interest Groups and Individuals Particularly Interested in BPA's 1981 Contract Negotiation Process" requested their help in identifying items for the meeting agenda and their suggestions for the specific location.

On April 24, 1981, BPA mailed letters to over 3,000 public interest groups and individuals stating that it would hold two public meetings in May to receive advice and accept comments on items of concern that had been identified in response to the April 8 letter. These evening meetings, held in Seattle, Washington, and Boise, Idaho, were announced in the **FEDERAL REGISTER** (46 FR 23287). The invitation was also extended to BPA customers. [2358] Congressman Ron Wyden (D-Or) and Acting Administrator Earl Gjelde issued a press release announcing the public meetings and the opportunity to submit written comments for contract items. An additional meeting, a special evening session with BPA's negotiating teams held in Portland, was later announced. This additional opportunity to comment on matters to be dealt with in the contracts was publicized in newspaper advertisements in the vicinity of the meeting locations. Over 300 people attended these public meetings which were recorded and transcribed. BPA representation included the Acting Power Manager, the Power Management Chief of Staff, five Division Directors in their role as principal negotiators, the Contract Negotiations Branch Chief, the Conservation Division Director, and the Fish and Wildlife Coordinator as well as Public Involvement, Environmental, Area office, and District staff. BPA contract leaders were also present at the Portland session. Attendees were given a brief written explanation of the contracts as they registered. Forty-one people presented statements at the Seattle and Boise meetings, and 19 people commented at the special evening session held in Portland.

On June 8, 1981, BPA sent summaries of the testimony received at the three public meetings and the written comments received through May 29, 1981, to meeting attendees as well as others who had indicated an interest in the contract negotiation process. The transcripts of the meetings and the summaries were also given to the various negotiating parties.

The Administrator issued a press release on May 13, 1981, announcing the remainder of the schedule for the negotiations. On June 11, 1981, BPA again contacted by mail those interested in the contract process advising them concerning the availability of draft prototype power sales and residential exchange contract, together with a draft report on associated environmental considerations. The FEDERAL REGISTER notice (46 FR 31238) sent with the letter announced a 30-day review-and-comment period ending July 13, 1981, and contained a summary of the significant elements of the draft contracts and of the major points of disagreement, as well as a notice of availability of a draft environmental report. The notice also advised interested parties of four public meetings scheduled in Seattle, Spokane, Portland, and Boise where they could comment orally on the draft contracts and environmental report. An additional public meeting was later scheduled and announced in Missoula, Montana. The meetings were publicized in newspaper advertisements in the localities, and were conducted by BPA Area office and District office personnel. The meetings were recorded and transcribed. The transcripts of the meetings and summaries of the testimony and written comments received through July 2, 1981, were given to the negotiating parties and those who had requested copies of all material distributed at the negotiating sessions.

As announced, written comments could be submitted through July 13, 1981. The comments which were received by July 13, 1981, from the public at large and from those who would be contract signators were read by a representative group of BPA, the Inter-Company Pool, the Public Power Council, the Direct Service Industries, and members of the public. BPA then began its formal in-house review and assessment of the comments submitted. The issues raised by the public comments and BPA's evaluation of these comments are explained below.

[2359]

BPA's customer comments have also been read, analyzed, and considered. It is BPA's position that the contract itself is BPA's final response to the issues as they have evolved during the negotiations process. Therefore, BPA has decided not to respond in this evaluation to each and every issue raised by its customers. BPA feels that the eight months of negotiations have provided the forum in which its customers could express their views on the issues. BPA has also responded directly to its customers in the negotiations process.

In order to respond fully to its customers, regarding those issues that remained unclear or unresolved at the end of the negotiations process, BPA set aside the week of August 3-7, at the Jantzen Beach Red Lion in Portland, Oregon, to discuss and resolve those issues. This was an intensive week of meetings directed at issue resolution. BPA attendees included the Administrator, Deputy Administrator, members of General Counsel's staff, plus the BPA negotiating teams. The week culminated on Friday, August 7, in sessions between BPA and each customer class, at which time the Administrator and Deputy Administrator reviewed the issues, reviewed the week's discussions and where possible stated the resolution of the issues as understood by BPA at the end of the negotiating process. The customers then responded, and a discussion of the issues followed. The week of the negotiations and the Friday review allowed all parties to have a clear understanding of the status of the issues on the final day of negotiations.

On Friday, August 28, 1981, BPA took final action on the proposed contracts by sending its offeral contract offers to eligible regional entities. Final utility power sales offers were sent to regional publicly-owned and investor-owned utilities, specific Federal Agencies, and current direct-service industrial customers. Final residential exchange

contract offers were sent to utilities which had requested residential exchange contracts.

On and after September 14, 1981, BPA will make available to the public for inspection and copying the Official Record of this process, including the Administrator's Record of Decision and the Final Environmental Report and BPA's Staff Evaluation of Public Comment listing the comments of individual commentators on the major issues.

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Schedule of Events
Leading to the Offering of Contracts

Volume X
Pages 2640 thru 2899

Contract Official Record
1981
Department of Energy
Bonneville Power Administration

[2640]

**Staff Evaluation of
Public Comments in Response to
BPA's Prototype Power Sales Contracts and
Residential Purchase and Sale Agreement**

**Prepared by
Bonneville Power Administration
U.S. Department of Energy
August, 1981**

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[2686]

VII. Direct Service Industry Power Sales Contract:
The Major Issues Identified and Addressed
by the Public and BPA's Evaluation
of those Comments

A. FISH AND WILDLIFE LANGUAGE

1. *Issue:*

Should language addressing BPA's and its customers' fish and wildlife responsibilities under the Regional Act and other laws be included in all Power Sales Contracts and exchange contracts?

2. *Comments:*

Public comments in summary form on this issue follow:

Columbia River Inter-Tribal Fish Commission, 7/13/81.

Shifting FELCC and use of Advance Energy to serve the DSI First Quartile may conflict with anadromous fish migrations (p. 4).

Fair Electric Rates Now, 7/14/81.

Contract provisions requiring prudent conservation of energy in excess of critical planning amounts for First Quartile service should specify that such conservation is subordinate to fish and wildlife obligations (p. 16).

The contract section dealing with fish and wildlife obligations should specify that such obligations take precedence over First Quartile service (p. 17).

The Second Quartile should be restrictable for fish and wildlife obligations (p. 16).

Washington Environmental Council, 7/10/81.

Section 7(c)(2) of the DSI draft should specify that resource acquisitions to serve the DSI First Quartile with shifted FELCC should not conflict with fish and wildlife obligations (p. 5).

The provision of section 7 of the DSI draft requiring Bonneville efforts to avoid reductions in generating capability should clarify that it cannot be used to avoid fish and wildlife obligations (p. 5).

The provision of section 7 of the DSI draft requiring Bonneville to acquire resources before imposing a Second Quartile restriction should be made contingent on fish and wildlife obligations (p. 5).

Operations to serve the First Quartile should be limited by fish and wildlife obligations. There should be a limit on the amount of Advance Energy that can be made available in order to protect fish. Bonneville commitments requiring return of Advance Energy should include fish and wildlife, especially for fish flows (p. 5).

[2687]

The Fish and Wildlife section should refer to sections 2 and 10 of the Regional Act (p. 6).

The Firm Obligations definition should provide that reserves for firm power customers not be detrimental to fish and wildlife, and should be made subject to environmental review (p. 6).

Evergreen Legal Services, 7/10/81.

The improved power quality of the First Quartile could sacrifice fish and wildlife values (p. 5).

Provisions for restriction for salmon and steelhead should be added (p. 5).

Natural Resources Law Institute, Lewis and Clark Law School, (Attachment, Anadromous Fish Law Memo), 7/9/81.

Enhanced service to the First Quartile may preclude Bonneville compliance with its fish and wildlife obligations (p. 5).

The Mid-Term Contract Review, Second Quartile restrictions, and FELCC shift provisions in the DSI draft

allow deeper reservoir drafts to the detriment of fish (p. 8).

Pacific Northwest Resources Clinic, University of Oregon Law School, 7/13/81.

First Quartile service should be conditioned on meeting fish and wildlife obligations (p. 31).

Conservation of energy in excess of critical planning amounts for First Quartile service should be conditioned on meeting fish and wildlife obligations (p. 33).

Shifting FELCC to serve First Quartile will have adverse impacts on fish and wildlife and should be conditioned on meeting fish and wildlife obligations and the concurrence of Federal and state fish and wildlife agencies and consistency with the Regional Plan (p. 31-32).

U.S. Department of Commerce, National Marine Fisheries Service, 7/13/81.

The section 7 provision of the DSI draft requiring Bonneville best efforts to avoid any reduction in resource generating capability appears to potentially conflict with operating a resource to comply with fish and wildlife obligations (p. 6).

DSI draft provisions calling for an FELCC shift for First Quartile service are improper because there is no limitation on Bonneville's discretion to shift, because it is unclear how such a shift would impact Corps of Engineers and Bureau of Reclamation reservoir operation, including for nonpower uses, and because shifting FELCC to serve First Quartile in a dry year can conflict with fish and wildlife needs. NMFS suggests incorporating fish flows in FELCC rule curves (pp. 6-7).

[2688]

William B. Culham, 5/6/81.

3. Evaluation

BPA's service to the DSIs will fulfill BPA's obligations to protect, mitigate, and enhance fish and wildlife, while

assuring the Region an adequate, efficient, economical, and reliable power supply. Those obligations are reaffirmed in section 11 of the DSI contract.

Furthermore, in the General Environmental Provision in the General Contract Provisions applicable to all Power Sales Contracts, the parties agree to "comply fully with all applicable Federal, State, and local environmental laws." Service to the First and Second Quartiles is subject to these provisions, by law, and as reaffirmed in the contract.

Current planning considers spills required for fish flows in critical rule curves. The hydro-system is available for multiple uses, and although shifting FELCC and Advance Energy will draw down reservoirs faster than if those actions did not occur, fish and wildlife are considered in those actions.

The Corps of Engineers has participated actively in determining the method of serving the First Quartile. The method that has been chosen, as stated in the August 14 letter referred to in the contract, is more acceptable to the Corps than a full-year shift or 6-month shift to FELCC because of the reduced impact on reservoirs. Furthermore, the agreement with the Corps and the Bureau of Reclamation for drafting reservoirs to provide Advance Energy is premised on the fact that such drafts do not have a major adverse impact on nonpower uses. Thus, concern for fish and wildlife has had a significant impact on BPA plans to operate to serve the First Quartile.

The Second Quartile has not been restrictable for fish and wildlife obligations in the past. There is Congressional direction that the DSIs should receive an equivalent amount of power to the amount they received under their IF agreements. If the Second Quartile, being a BPA firm load, is restrictable for fish and wildlife obligations, then all firm loads, including utility loads, should also be restrictable for fish and wildlife obligations.

Sections 2 and 10 of the Regional Act do not speak as directly to BPA's fish and wildlife obligations as does section 4, and therefore, those sections were not mentioned in section 11 of the DSI contract.

* * * *

[2692]

C. IMPROVED DSI POWER QUALITY

1. Issue:

Is improved power quality for the DSI First Quartile required by the Regional Act or in contravention of it?

Are there unfavorable consequences to the Region as a result of improved DSI power quality?

Should First and Second Quartile restriction rights be greater than they are in the contract draft?

2. Comments:

Public comments in summary form on these issues follow:

Fair Electric Rates Now (Attachment, Jim Lazar), 7/13/81.

The DSI draft allows the DSIs higher First Quartile power quality than is mandated by the Regional Act. The legislative history indicates that Bonneville should have more flexibility in imposing restrictions, not less (pp. 13-14).

The DSIs are paying rates for interruptible power but getting a firm contract. The DSIs should be charged a higher rate for First Quartile power (p. 13).

The limitation on the 25 percent Forced Outage and Stability Reserve should be eliminated (p. 16).

Delete the 180-day limitation for restriction due to forced outage of an operating resource during a Contract Year (p. 17).

DSIs should not have access to preference customer power for service above Contract Demand levels (p. 1).

Bonneville should only obligate itself to use best efforts to acquire resources for offering follow-on contracts (p. 17).

Fair Electric Rates Now (Attachment, Jim Lazar) 7/13/81.

Conservation of energy in excess of critical planning amounts for First Quartile service should be subordinate to the requirement of the Regional Plan (p. 16).

Idaho Consumer Affairs, Inc., 7/13/81.

Opposes "interruptibility credit payments." DSIs should bear risk of failed resources. They are paying low rates yet getting high quality power. Bonneville should provide for restriction of DSI loads during Regional insufficiency. Acquisition of single cycle combustion turbine resources to serve DSI loads will be paid for by Regional rate-payers (p. 3).

[2693]

Evergreen Legal Services, 7/10/81.

Use of shifted FELCC and Advance Energy to serve the First Quartile will decrease Bonneville's ability to meet load (p. 5).

Natural Resources Defense Council, Inc., 7/13/81.

DSI First Quartile power quality should not be improved. Such improved service contravenes the Regional Act. Bonneville reliance on Appendix B to the Senate Report is tenuous (pp. 23-24).

Pacific Northwest Resources Clinic, University of Oregon Law School, 7/13/81.

The DSI draft improves First Quartile power quality in contravention of the Regional Act (pp. 35-39).

First Quartile restriction rights should be 25 percent of Contract Demand, not Operating Demand (p. 39).

Shifting FELCC for First Quartile service increases chances of Regional curtailment (pp. 40-41).

The DSI draft obligating Bonneville to purchase gas turbine energy to serve the portion of the First Quartile served with shifted FELCC contravenes section 9(i)(1) of the Regional Act (pp. 41-42).

No Bonneville obligation to acquire resources before imposing a Second Quartile restriction existed in the previous contracts; such an obligation should not now be adopted (p. 43).

It is inappropriate not to restrict Second Quartile for lack of appropriated funds (p. 43).

Requiring Bonneville's best efforts to avoid reductions in generating capability could put it in the position of unnecessarily or improperly fighting legal battles on behalf of the DSIs (p. 44).

Oregon Department of Energy, 7/14/81.

Bonneville's plan to purchase resources to serve the First Quartile is not required by law (pp. 9-10).

Washington State Energy Office, 7/10/81.

Service to the First Quartile with shifted FELCC imposes a risk of Regional shortage because DSI return obligations are not based on need. DSI First Quartile service with shifted FELCC should be tied to nonconditional recall rights (pp. 1-2).

Washington Utilities and Transportation Commission, 7/10/81.

Shifting FELCC for First Quartile service should be deleted because it could result in Regional curtailments (p. 2).

[2694]

John C. Neely, Jr., 4/30/81.

Service to Alumax is an uneconomical and unecological use of electricity and will require acquisition of expensive resources (pp. 1-5).

3. *Evaluation*

Section 5(d)(1)(B) of the Regional Act provides that each DSI shall receive "an amount of power equivalent to which such customer is entitled under its contract for . . . the sale of industrial firm power existing at the passage of the Regional Act." The contracts provide for a single class of power and divide service into four approximately equal "quartiles." BPA plans to develop and acquire firm resources to serve 75 percent of the DSI load as firm and serve the top quartile or additional 25 percent, ". . . as if it were firm." (S. Rep. 96-272, 96th Cong., 2d Sess. 59 (1979)). This is characterized in section 8(a)(1) of the BPA-DSI contracts, "as a firm load for purposes of resource generation only."

BPA characterizes top quartile service as "quasi-firm," having undeniable firm characteristics and served by operating resources to provide a power quantity with firm characteristics, while not installing resources to meet it on an absolutely firm basis. The Regional Act provides a clear statutory basis for service in this manner. By section 5(d)(1)(A), sales to DSI's are "to provide a portion of the Administrator's reserves for firm power loads" The term "reserves," as defined by the Regional Act, means "the electric power needed to avert particular planning or operating shortages for the benefit of firm power customers. . . ." Section 3(17). In other words, service to the top quartile cannot be restricted to provide service to nonfirm loads or to make sales of nonfirm energy.

Any suggested ambiguity from the section 5(d)(1)(A) reference to DSI sales as "[s]uch sales," (i.e., whether it

refers to three quartiles of nondisputed firm or treats the top quartile as quasi-firm) is resolved by the Regional Act's legislative history. The Senate Energy Committee Report directs BPA to plan and develop "'firm' resources under critical streamflow conditions to carry 75 percent of the total DSI requirement," with the additional 25 percent, or "top quartile," to "be served with resources which are in excess of critical planning amounts but operated to meet the entire DSI load as if it were firm." S. Rep. No. 272, 96th Cong., 2d Sess. 59 (1979). In addition, the House Interior Committee Report states that:

"Sales to existing DSI's are required to provide a portion of BPA's power system reserves . . . The DSI's will provide two types of energy reserves. Approximately 25 percent of the DSI load is to be treated as a firm load for purposes of resource operation and will provide an operating reserve which may be restricted by BPA at any time in order to protect the Administrator's firm loads within the region . . . An additional 25 percent of the DSI load will be treated as firm load for both planning and operating purposes and will provide a planning reserve to protect the Administrator's firm loads"

[2695]

Senators Jackson and McClure, the past and present Chairmen of the Senate Committee on Energy and Natural Resources, have concurred that the House Interior Committee Report reflects the accurate position of the Senate on the "reserves" question. See 126 Cong. Rec. 14691 (daily ed. Nov. 19, 1980) (remarks of Senator Jackson) and *Id.* at 14698 (remarks of Senator McClure).

The DSIs play a vital part in the Regional power scheme. DSI revenues will pay the costs of the residential exchange through June 1985. After June 1985, DSI revenues will continue to be important. The DSIs alleviate the need for

BPA to acquire additional expensive generating resources for reserves. Improved first quartile DSI power quality will generate additional revenues.

Both restrictions and operations were extensively debated among BPA customer groups before the final provisions were adopted. The provisions adopted are intended to provide the DSIs with the power quality required by law with minimum cost and minimum adverse impacts on other customer groups.

The "August 14 letter" operating plan, which serves as a safety net for first quartile operations, minimizes shift of FELCC from later Critical Period years for first quartile service, thus reducing reservoir drawdown over the Critical Period and adverse impacts on other systems. This plan would serve as the basis for first quartile operations throughout the contract term, and could only be replaced with a plan with equivalent risks and benefits to the DSIs and BPA. Furthermore, service with Advance Energy is maintained, which is returnable based on need in the same Contract Year, improving chance of refill. The August 14 letter also provides for borrowing FELCC from later in the same Contract Year, with return provisions tied to need later in the same year, again improving chances of refill. These methods of serving the first quartile, shifting and borrowing FELCC and Advance Energy, along with pre-Critical Period surplus energy early in the Contract Year, are all limited to the date that the first reliable runoff forecast is available, presently January 10. After that date, the first quartile would be served with water in excess of critical planning amounts.

BPA has generally retained the same restriction rights it had in the previous contracts with the exceptions of improved first quartile power quality and additional second quartile restriction rights for failure of an operating resource. The DSI second quartile would provide a reserve

for one-half of such an outage for seven years. Forced outage and stability reserves have been increased slightly. Availability credits are no longer provided for, which the House Interstate and Foreign Commerce Committee Report on S. 885 at page 62 noted had reduced BPA flexibility.

The BPA obligation to acquire resources to serve the DSI load is limited to acquiring resources for 75 percent of their load. BPA is obligated to purchase resources that are reasonably priced and legally available to serve the part of the first quartile served with shifted FELCC. This is because that shifted FELCC comes from the DSI third quartile of later Critical Period years, which is part of the DSI load for which BPA is obligated to acquire resources before making the subsequent third quartile restriction. Because BPA is obligated to treat the second quartile as part of its firm load for resource acquisition purposes, there is also an obligation to acquire legally [2696] available, reasonably priced resources before imposing or continuing a second quartile restriction.

The "legally available" qualification means that such resources can only be acquired consistent with BPA's cost effectiveness obligations established in the Regional Act for long-term acquisition, and other provisions including environmental criteria. The term "reasonable cost" does not require BPA to acquire single cycle gas turbine energy, unless BPA determines that such energy is reasonably priced at the time of the acquisition.

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Leading to the Offering of Contracts
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[2800]

Environmental Report
Environmental Review of the Issues and Alternatives
Associated With the Offering of the Power Sales
and Residential Exchange Contracts Required
Under the Pacific Northwest Electric Power Planning
and Conservation Act (Public Law 96-501)

September 1981
Bonneville Power Administration
U.S. Department of Energy

[2854]

* * *

4.2 DSI Resource Acquisitions

4.2.1. *Explanation of Issues and Alternatives*

The question of whether BPA's DSI customers are authorized to independently acquire resources to serve that portion of their top quartile not otherwise served by BPA ("topping off" resources) has been discussed during the negotiations but is not addressed in the power sales contracts. Instead, specific DSI resource proposals will be dealt with individually under separate contracts.

Some DSIs expressed interest in acquiring resources to assure themselves of essentially firm service in the event of BPA restrictions to their top quartile of contract demand. Their position was based on the economics of operation. This applies, principally, to the costs of shutting down aluminum reduction cells or "pots," and losing production when top quartile service is restricted. The argument was that the amount of power needed to continue service is frequently minimal; that is, the megawatthours made available by BPA to the DSIs sometimes fall just short of what is necessary to keep production ongoing. The DSIs which sought to acquire their own resources maintained that the development of "topping off" resources therefore made economic sense. The DSIs also maintained

that they could independently construct such resources as a matter of law, and that nothing implicit in their receiving service from BPA impinged on this authority.

BPA viewed the matter from a different perspective and believes that for several reasons the DSIs should not acquire "topping off" resources. First, under the Regional Act, the DSIs sought and achieved a significantly improved service: "... a quantity of power ... based on the proportion of total industrial requirement, on a long-term average (currently estimated to be between 85 and 96 percent of the total DSI load)" (Senate Report 96-272, p. 59). There is no showing that where the DSIs elect to receive service from BPA, they should also be able to independently acquire their own resources. This is particularly true where construction of such resources could adversely impact BPA's own ability to acquire resources to meet its own power supply responsibilities. This could occur if state siting councils or others with [2855] authority to license projects based on resource need concluded that regional resources were adequate because of DSI generation. However, because DSIs are not utilities and have no utility responsibility, there would be no assurance that other BPA customers and their consumers would have access to them during the period of greatest need—critical water.

Finally, BPA also has a strong concern regarding equity in treatment of all customer classes. BPA will be serving the DSIs under the Regional Act with an improved quality of power. This Congressionally mandated improvement in quality of service will result in less secondary or non-firm energy being available for other customer classes. BPA does not believe that the DSIs should receive both higher quality of power and be able to build resources which are needed only during infrequent periods of restriction, while also displacing those resources to their economic advantage whenever possible.

Power Sales Contract (DSI)
(8/4/81-8/25/81)

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[3798]

. . . .

[7(e)] *Third Quartile Restriction Rights.*

(1) Bonneville may restrict deliveries of Industrial Firm Power to the Purchaser to serve its Third Quartile load during a Contract Year, subject to the provisions of paragraph (5) below, up to the amount of electric energy evidenced by:

(A) the greater of the outstanding debits in the Purchaser's Delivered FELCC Account or the Purchaser's applicable Shifted FELCC Account, if, for such Contract Year, the FELCC is established from the last Contract Year of a Critical Period; or

[3799]

(B) the lesser of the outstanding debits in the Purchaser's Delivered FELCC Account or the Purchaser's applicable Shifted FELCC Account, if, for such Contract Year, the FELCC is established from other than a last Contract Year of a Critical Period.

(2) Simultaneously with any actual restriction in a Contract Year for which FELCC is established from the last Contract Year of a Critical Period Regulation pursuant to subparagraph (1)(A) above, Bonneville shall publicly call for a region-wide voluntary curtailment of non-essential uses of electric energy, and shall include in its region-wide appeal the information that Bonneville's ability to continue to meet its Firm Obligations depends on such voluntary curtailment as well as on actual restrictions of the Purchaser's load hereunder. All such appeals shall be repeated at regular intervals during any period when actual restrictions hereunder remain in effect.

(3) If during a Contract Year Bonneville borrows FELCC from later months of such Contract Year and uses such borrowed FELCC to serve the Purchaser's First

Quartile load, Bonneville may restrict deliveries of Industrial Firm Power later in such Contract Year up to 25 percent of the Purchaser's Operating Demand. Such restriction shall not exceed the lesser of (A) the amount of energy delivered to the Purchaser as borrowed FELCC, or (B) the Purchaser's share of the amount of energy by which Bonneville is otherwise unable to meet its Firm Obligations during such Contract Year by reason of the borrowed FELCC during such Contract Year.

[3800]

(4) Bonneville shall use its best efforts to store and conserve water and energy associated therewith in order to avoid or to reduce the Purchaser's exposure to restriction pursuant to paragraphs (1) and (3) above.

(5) The total of restrictions pursuant to this subsection shall not exceed in any case the lesser of:

(A) 25 percent of the Purchaser's Operating Demand less the amount of the Purchaser's Third Quartile load curtailment pursuant to section 9(c); or

(B) the Purchaser's share of the amount of energy by which Bonneville is otherwise unable to meet its Firm Obligations, by reason of the borrowed or Shifted FELCC, after using its full FELCC, including the operation or replacement of all the resources included therein.

(6) Bonneville shall not restrict the Purchaser's Third Quartile load for the purpose of selling nonfirm energy under the NF-1 rate schedule, its successor, or any other rate schedule. Bonneville shall not be obligated to plan for or acquire resources to alleviate a Third Quartile restriction pursuant to this subsection, but Bonneville will treat the Purchaser's Third Quartile load as a firm load for purposes of resource operation.

* * * *

[3807]

[§ 8(a)(2)] Bonneville will meet the foregoing obligation while retaining the restriction rights set forth in this contract. Nonfirm energy will not be sold under the NF-1 rate schedule, its successor, or any other rate schedule if, in Bonneville's sole determination, such energy could be prudently conserved for service to the Industrial Purchasers' First Quartile loads.

* * * *

[3822]

[8(c)(9)] To the extent that Bonneville sells nonfirm energy in accordance with the provisions of this contract using water which could have been stored or conserved for purpose of avoiding or reducing the Purchaser's Advance Replacement Energy obligation, Bonneville shall acquire or recall any electric energy which it is legally authorized to acquire or recall, and which is available at a Reasonable Cost, before requiring delivery of Advance Replacement Energy.

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• • •

1.4 INDUSTRIAL FIRM POWER: Industrial firm power is power which the Administrator will make continuously available to a purchaser on a contract demand basis subject to:

- a. the restriction applicable to firm power, and
- b. the following:

(1) The restrictions given in section 8, "Restriction of Deliveries," of the General Contract Provisions (Form IND-18) of the contract.

(2) When a restriction is made necessary because of the operation of generating or transmission facilities used by the Administrator to serve such purchaser and one or more firm power purchasers is suspended, interrupted, interfered with, curtailed or restricted as a result of the occurrence of any condition described in the Uncontrollable Forces or Continuity of Service sections of the General Contract Provisions of the contract, the Administrator shall restrict such purchaser's contract demand for industrial firm power to the extent necessary to prevent, if possible, or minimize restriction of any firm power. When possible, restrictions of industrial firm power will be made ratably with restrictions of modified firm power based on the proportion that the respective contract demands bear to one another. The extent of such restrictions shall be limited for modified firm power by section 1.2(b) of the General Rate Schedule Provisions and for industrial firm power by section 8 of the General Contract Provisions of the (Form IND-18) contract.

• • •

[6290]

Correspondence and Comments on
Contract Items
(Jeep thru Wolf)
and Correspondence and Comments Received
after Close of Comment Period

Volume XXX
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Bonneville Power Administration

[8406]

Letter from the
Public Generating Power Pool
Chelan Co PUD
Cowlitz Co PUD
Douglas Co PUD
Eugene Water & Elec Bd
Grant Co PUD
Seattle City Light
Tacoma City Light

Division of Power Management

No. 1-241

Date 7-13-81

July 13, 1981

Ms. Donna L. Geiger
Public Involvement Coordinator
Bonneville Power Administration
P.O. Box 12999
Portland, Oregon 97212

Dear Ms. Geiger:

The majority of the member utility systems of the Public Generating Pool; Public Utility District of Snohomish County; Central Lincoln Peoples' Utility District, Clatskanie Peoples' Utility District, Northern Wasco Peoples' Utility District and Tillamook Peoples' Utility District submit the following comments in response to the Bonneville notice in the Federal Register of June 12, 1981 at page 31,238. The Public Generating Pool members commenting herein are the Eugene Water & Electric Board; Public Utility District No. 1 of Chelan County; Public Utility District No. 1 of Cowlitz County; Public Utility District No. 2 of Grant County; the City of Seattle, Light Department; and, the City of Tacoma, Department of Public Utilities.

Most of the comments of these parties concern the Contract Elements for the Bonneville contracts with the Direct Service Industries (DSI's) and the proposed prototype DSI contract dated June 8, 1981 and a later draft dated July 2, 1981. The status of this July draft as a Bonneville proposal is unknown.

* * * *

[8409]

7(c) First Quartile Restriction Rights

Both the June 8 and July 2, 1981 proposed drafts for section 7(c)(2) require Bonneville to either acquire or recall electric energy before restricting the first quartile. This requirement may result in forcing a restriction of a utility firm load in order to serve the DSI nonfirm top quartile. Such a result would violate the preference and priority sections of the Bonneville Act and the Regional Act.

Section 7(c)(3) of the contract drafts of June 8 and July 2, 1981 may be claimed to give the DSI's priority to all energy generated by water in excess of critical water planning to serve the top quartile. Under the Regional Act the top quartile is to be restrictable. This proposed provision could result again in service to DSI nonfirm loads to the detriment of regional utilities' firm loads. An occurrence of drought conditions could be disastrous to preferences agencies.

For example, in 1973, near drought water conditions existed throughout the Pacific Northwest with especially critical water conditions for west Cascade reservoirs. As a result, resources of computed demand preference customers, such as the City of Seattle and the City of Tacoma fell below their assured capability projections. Short-term energy purchases were required. Since some secondary energy was then available on the BPA system, purchasers were made from federal resources by these two preference customers.

Under the proposed contract language, however, this secondary energy would be made available first to serve the top quartile of the DSI load. Thus, while a nonfirm industrial load would continue to be served with federal preference power, firm loads of publicly owned utility

systems would either be curtailed on an emergency basis or impacted by outside regional thermal purchases, if available, requiring imposition of draconian surcharges. Such was the case in 1977.

* * * *

MAR 7 1983

ALEXANDER L. STEVAD,
CLERK

In the Supreme Court of the United States

No. 82-1071

ALUMINUM COMPANY OF AMERICA, ET AL.,
Petitioners,

v.

CENTRAL LINCOLN PEOPLES' UTILITY DISTRICT, ET AL.,
PORTLAND GENERAL ELECTRIC CO., ET AL., and
PETER JOHNSON, ET AL., *Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

**BRIEF FOR RESPONDENTS
CENTRAL LINCOLN PEOPLES' UTILITY DISTRICT, ET AL.
IN OPPOSITION TO THE
PETITION FOR WRIT OF CERTIORARI**

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QUESTION PRESENTED

When the Ninth Circuit applied the appropriate standard of judicial review and found four contract provisions, which are unique to fourteen companies in the Pacific Northwest, to be unreasonable and unauthorized by statute, should the Supreme Court grant the Petition for Writ of Certiorari?

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In the Supreme Court of the United States

No. 82-1071

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PORTLAND GENERAL ELECTRIC CO., ET AL., and
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ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

**BRIEF FOR RESPONDENTS
CENTRAL LINCOLN PEOPLES' UTILITY DISTRICT, ET AL.
IN OPPOSITION TO THE
PETITION FOR WRIT OF CERTIORARI**

RELEVANT STATUTES

Bonneville Project Act "Preference Clause":

Section 4(a). In order to insure that the facilities for the generation of electric energy at the Bonneville Project shall be operated for the benefit of the general public, and particularly of domestic and rural consumers, the administrator

shall at all times, in disposing of electric energy generated at said project, give preference and priority to public bodies and cooperatives [16 U.S.C. § 832(a)].

Flood Control Act of 1944 "Preference Clause":

Section 5. Electric power and energy generated at reservoir projects under the control of the Department of the Army and in the opinion of the Secretary of the Army not required in the operation of such projects shall be delivered to the Secretary of the Interior, who shall transmit and dispose of such power and energy in such manner as to encourage the most widespread use thereof at the lowest possible rates to consumers consistent with sound business principles * * *. Preference in the sale of such power and energy shall be given to public bodies and cooperatives. [16 U.S.C. § 825(5)].

Northwest Regional Act "Preference Clauses":

Section 5(a). All power sales under this Act shall be subject at all times to the preference and priority provisions of the Bonneville Project Act of 1937 (16 U.S.C. 832 and following) and, in particular, sections 4 and 5 thereof. Such sales shall be at rates established pursuant to section 7. [16 U.S.C. § 839c(a)].

Section 10(c). Nothing in this Act shall alter, diminish, abridge, or otherwise affect the provisions of other Federal laws by which public bodies and cooperatives are entitled to preference and priority in the sale of federally generated electric power. [16 U.S.C. § 839(c)].

Northwest Regional Act "Limitation on DSI Power":

Section 5(d)(1)(B). After the effective date of this Act, the Administrator shall offer in accordance with subsection (g) of this section to each existing direct service industrial customer an initial long term contract that provides such customer an amount of power equivalent to that to which such customer is entitled under its contract dated January or April 1975 providing for the sale of 'industrial firm power.' [16 U.S.C. § 839c(d)(1)(B)].

STATEMENT OF THE CASE

On August 28, 1981, the Bonneville Power Administration (BPA) executed contracts for the purchase of power with its directly served industrial customers (DSIs) pursuant to the recently enacted Pacific Northwest Electric Power Planning and Conservation Act (Northwest Regional Act). The contracts contained provisions which changed the marketing priorities of BPA for nonfirm energy sold to the DSIs and the publicly-owned preference customers of BPA.

On August 31, 1981, respondents, 12 publicly-owned utility preference customers of BPA, filed suit against BPA, seeking to invalidate numerous provisions of the DSI contracts. The publicly-owned utilities sought to prevent BPA from violating the Northwest Regional Act by allocating to the DSIs an amount of power greater than the DSIs entitlement under the Act and power to which the publicly-owned

utilities have preference. All of the privately-owned utilities in the Northwest and the Public Power Council, on behalf of the remaining 104 publicly-owned utilities in the Northwest, joined as plaintiffs.

The publicly-owned utilities narrowed their complaint by dismissing certain counts of their action because BPA compromised its position and modified provisions in its Power Sales Contracts. However, BPA refused to modify four contract provisions in the DSI contracts. The Ninth Circuit heard the action based on the publicly-owned utilities' claims that these four provisions: (1) violated express preference requirements of the Bonneville Project Act, the Flood Control Act of 1944 and the Northwest Regional Act; (2) provided the first quartile of the DSIs' load with a greater amount of power than they were entitled to under the Northwest Regional Act; and (3) violated BPA Marketing Policy Procedures by changing the priority to nonfirm energy without following required administrative procedures.

In defense, BPA claimed its authority came from two minor passages in the legislative history of the Northwest Regional Act.¹

On April 6, 1982, a three-judge panel of Chief Judge Browning, Judge Wallace and Judge Boochever held that the contract provisions were invalid because

¹ See 686 F.2d 713-714; Ninth Circuit Brief of Federal Respondents, p. 21.

they violated statutory preference. The court did not reach the other two issues.

The DSIs and BPA petitioned for rehearing and suggested a rehearing *en banc*. The panel amended its decision to reach the second issue, and held that the contract provisions were also invalid because BPA violated Section 5(d)(1)(B) of the Northwest Regional Act by providing the DSIs with a greater amount of power than they were entitled to under the Act. The Ninth Circuit then denied the petition for rehearing.

The Ninth Circuit also denied the DSIs' suggestion for rehearing *en banc* because the petitioners did not convince a single judge of the Ninth Circuit that there was any issue which warranted rehearing. The DSIs' arguments in the Petition for Writ of Certiorari are identical to their arguments for rehearing.

BPA has marketed nonfirm power in accordance with the Ninth Circuit decision from April 6, 1982 to the present, despite the Ninth Circuit's stay of its mandate pending outcome of the DSIs' petition.² The decision does not affect any other DSI contract provisions.

BPA did not petition this Court for certiorari.

² Contrary to the parade of horrors in the DSIs' Petition and the federal respondents' Brief, BPA has suffered no adverse impact on either its system operation or its revenues from this decision. BPA understood this when it chose to market nonfirm energy as if the Ninth Circuit had not stayed its mandate.

INTRODUCTION

The Bonneville Project Act of 1937 created BPA to market power from a federal hydro-electric project on the Columbia River. The Act required, as its basic premise, that preference be given to publicly-owned utilities which were forming in the Northwest. Preference provides power generated by publicly-owned resources to the greatest number of people at the lowest possible cost and avoids the monopolization of power by industry that occurred on earlier publicly-owned projects.

Eventually BPA acquired the authority to market power from all the federally-owned dams in the Northwest. Preference controlled all firm and non-firm power BPA marketed.

However, BPA had no statutory authority to build its own generation. Therefore, as the projected demand for power began to exceed the projected supply, BPA made plans to allocate power among publicly-owned utilities and informed the DSIs that BPA could probably not renew their contracts. Congress then passed the Northwest Regional Act to resolve potential competing claims for BPA power by BPA's preference customers, to help the DSIs remain in the Northwest and to provide rate relief for the private utilities.

The Northwest Regional Act authorizes BPA to acquire resources to serve all of its customers. Based on the assumption that BPA could acquire sufficient

resources to serve the DSIs, after the preference customers are served, the Act "deems" BPA sufficient in power to offer long-term contracts to the DSIs. Nevertheless, the Northwest Regional Act requires that *all* sales under it, whether firm or nonfirm, are subject to the preference.³

The DSIs supported passage of the Northwest Regional because the Act authorized BPA to offer them long-term power contracts.⁴

Publicly-owned utilities supported the legislation because the Northwest Regional Act preserved their preference to supply of both firm and nonfirm energy and the Act assured that BPA could meet the utilities' future power needs. Privately-owned utilities support-

³ Section 5(a) :

"All power sales under this Act shall be subject at all times to the preference and priority provisions of the Bonneville Project Act of 1937 (16 U.S.C. 832 and following) and, in particular, sections 4 and 5 thereof. Such sales shall be at rates established pursuant to section 7." [16 U.S.C. § 839c(a)].

⁴ The DSIs, through their counsel in this petition, testified to Congress:

"Under this legislation, the price of a reasonable degree of planning certainty for the DSIs is the surrender of their existing low-cost power contracts in exchange for new contracts with dramatically higher rates and substantially lower power quality." Hearings on HR 2508 and 4159, before Subcommittee on Energy and Power of the House Committee on Interstate and Foreign Commerce, 311 (1979) (Testimony of Eric Redman).

ed the Northwest Regional Act because the DSIs and the publicly-owned utilities would provide rate relief for their residential and small farm customers.⁵

REASONS WHY THE PETITION FOR CERTIORARI SHOULD NOT BE GRANTED

1. THERE IS NO CONFLICT AMONG THE CIRCUITS.

As the federal respondents admit, there is no conflict among the circuits. The decision affects only the Pacific Northwest because the Northwest Regional Act applies exclusively to that region.

Congress vested exclusive and original jurisdiction for suits under the Act in the Ninth Circuit. 16 U.S.C. § 839f(e) (5). This unique design prevents conflicting decisions by the region's district courts or by courts of appeal outside the Pacific Northwest. This design provides uniformity and finality to interpretations of the Act.

Congress obviously relied on the Ninth Circuit's expertise in reviewing federal power marketing statutes. The Ninth Circuit has decided many cases involving interpretations of statutory preference and allocation of power provisions. The Ninth Circuit found that its decision follows its previous decisions

⁵ This year, BPA allocated in excess of 50 million dollars to its publicly-owned utility customers to provide rate relief for the privately-owned utilities.

involving similar preference and allocation statutes. 686 F.2d at 711, 714-715.⁶

The Petition claims a "conflict in principle" with a Sixth Circuit affirmance in *Volunteer Electric Co-operative v. Tennessee Valley Authority*, 13 F. Supp. 22 (E. D. Tenn. 1954), *aff'd* 231 F.2d 446 (6th Cir.). That case involved different facts and different law and was distinguished by the Ninth Circuit in its decision. 686 F.2d at 715. Moreover, the only conflict in principle claimed is between *Volunteer* and the Ninth Circuit's previous decision in *City of Santa Clara, Cal. v. Andrus*, 572 F.2d 660 (9th Cir. 1977), in which this Court denied the petition for certiorari. 439 U.S. 859 (1979).

2. THE NINTH CIRCUIT FOLLOWED THE APPROPRIATE STANDARD OF REVIEW.

The Ninth Circuit followed this Court's decisions in construing the Northwest Regional Act and BPA's interpretation of the Act. The Ninth Circuit gave "substantial deference" to BPA's statutory interpretation because BPA is the agency charged with implementing the statute and participated in its drafting. The Ninth Circuit limited its review solely to

⁶ See, *Anaheim v. Duncan*, 653 F.2d 1326, (9th Cir. 1981); *Anaheim v. Kleppe*, 590 F.2d 285 (9th Cir. 1978); *City of Santa Clara, Cal. v. Andrus*, 572 F.2d 660 (9th Cir. 1978), *cert. denied sub nom. Pacific Gas & Electric Co. v. City of Santa Clara, Cal.*, 439 U.S. 859 (1978); *Arizona Power Pooling Association v. Morton*, 527 F.2d 721 (9th Cir. 1975), *cert. denied sub nom. Arizona Public Service Co. v. Arizona Power Pooling Association*, 425 U.S. 911 (1976).

whether BPA's interpretation was reasonable. The Ninth Circuit cited and followed: *United States v. Rutherford*, 442 U.S. 544, 553 (1979); *Zuber v. Allen*, 396 U.S. 168, 192 (1969); *Udall v. Tallman*, 380 U.S. 1 (1965); *Columbia Basin Land Protection Association v. Schlesinger*, 643 F.2d 585, 600 (9th Cir. 1981).

The Ninth Circuit, after "[g]iving all due deference to BPA's construction," found the construction unreasonable (686 F.2d at 711) and found BPA's convoluted interpretation "contravenes the longstanding preference explicitly continued under the Act and is without express statutory support" (686 F.2d at 715).

The Ninth Circuit held that provisions of the Act expressly reaffirmed the preference of publicly-owned utilities to nonfirm energy. The Ninth Circuit found that its "straightforward construction is preferable because it harmonizes what otherwise would be conflicting provisions of the Act." See generally *Erlengaugh v. United States*, 409 U.S. 239, 244 (1972); *Clark v. Uebersee Finanz-Korp*, 332 U.S. 480, 488-489 (1947). 686 F.2d at 712.

The Ninth Circuit concluded that its construction is consistent with its findings in analogous cases involving statutory construction and similar claims of exemption from preference, citing *Arizona Power Pooling Association v. Morton*, *supra*, and *City of*

Santa Clara, Cal. v. Andrus, supra. 686 F.2d at 711, 714-715.

Review by this Court would require the Court to substitute its judgment for the judgment of the Ninth Circuit. The DSIs want this Court to review the same statutory provisions and case law reviewed by the Ninth Circuit⁷ and to find (1) express statutory authority for the DSIs' position where the Ninth Circuit found none, and 2) a contravention of the longstanding preference explicitly continued under the Northwest Regional Act where the Ninth Circuit found none.

3. THE DECISION DID NOT AFFECT THE DSIs ECONOMICALLY NOR DID IT AFFECT BPA REVENUES.

The DSIs and the federal respondents allege a list of potential horrors resulting from the decision. All of them are incorrect and alleged solely to alarm this Court.

The decision maintains the amount of power sold to the DSIs and the amount of revenue BPA derives from such sales. The Northwest Regional Act continues service to the DSIs first quartile in four ways: (1) BPA purchases pursuant to § 9(i)(1) of the

⁷ In order for the DSIs to prevail on the challenged contract provisions, this Court would not only have to reverse the Ninth Circuit on both of the issues, but the Ninth Circuit would then have to determine whether BPA failed to follow required procedures in adopting the contract provisions. 686 F.2d at 715.

Northwest Regional Act; (2) DSI direct purchases; (3) shifting of water in the reservoirs; and (4) non-firm energy. BPA serves the first quartile with non-firm energy only during a portion of the year. If non-firm is not available, the first quartile is served by one of the other three methods. After the decision, the DSIs receive an amount of power equivalent to that which they received before the Act.

The DSIs and the federal respondents allege that the decision may cause industries to leave the Region and that one has left already.⁸ The world aluminum market is severely depressed. Market conditions, not changes in priority to nonfirm energy, have caused the DSIs to operate at fifty percent or less of their capacity.⁹ The Ninth Circuit decision has not increased by even one cent, the cost of producing aluminum in the Pacific Northwest.

The federal respondents and the DSIs allege that the Ninth Circuit decision may cause BPA to suffer a revenue shortfall because anticipated revenues will not be recovered from the DSIs. In recovering costs for first quartile service BPA bases its rates on expected average service to the first quartile. The

⁸ The only industry that closed was not even operating *prior* to the Northwest Regional Act but was receiving power only for security and plant maintenance.

⁹ Presently, BPA has an enormous surplus of hydroelectric power and is spilling water without generating electricity. The DSIs are not purchasing this inexpensive power.

Ninth Circuit's decision does not affect this average service, and therefore, will not affect BPA's recovery of anticipated revenues.

The federal respondents allege that BPA may have to build additional generation. That is not correct. BPA is prohibited from building generation to serve the interruptible first quartile of the DSIs. See Ninth Circuit Brief of Federal Respondents, p. 24, lines 10-12; Ninth Circuit DSI Brief, p. 25.

More importantly, the Ninth Circuit decision ensures that, in a low water year, cities like Eugene and Seattle will have access to power when a generation plant breaks down or their utility's load peaks above BPAs' firm power reserves instead of facing potential blackouts.

4. THE DECISION BELOW GAVE FULL CONSIDERATION TO THE ISSUES AND DECIDED THEM CORRECTLY

The DSIs and federal respondents repeat the arguments they made to the Ninth Circuit and ask this Court to substitute its judgment for the judgment of the Ninth Circuit. They argue that:

(1) The definition of reserves in the Northwest Regional Act [§ 3(17)] coupled with the requirement that sales of power to the DSIs provide reserves for the firm loads of BPA [§ 5(d)(1)(A)], require that the DSIs' first quartile loads of approximately 1,000 megawatts be served with nonfirm energy ahead of

the approximately 25 megawatts of nonfirm energy purchased annually by the preference customers.

The Ninth Circuit held that the fact that the DSIs provide reserves does not create an entitlement to an allocation of power ahead of the preference customers. "It is a non sequitur to conclude from the fact that the reserve cannot be used for non firm needs that the nonfirm energy cannot initially be allocated to the preference customers in accordance with the preference."¹⁰ 686 F.2d at 712.

(2) Two provisions in the legislative history support their argument on nonfirm energy priorities.

The Ninth Circuit held that the legislative history is ambiguous.¹¹ The two provisions cited are not clearly instructive on the issues involved in the case. 686 F.2d at 713-714.

(3) Although the Northwest Regional Act provides that the DSIs are entitled to only an amount of power equivalent to their entitlement under their 1975 con-

¹⁰ Although not addressed by the Ninth Circuit, it was also undisputed that the nature of reserves provided by sales to the DSIs for their first quartile loads was *exactly the same* before the Northwest Regional Act as expressed in the Act. Compare § 3(17) of the Act to the BPA Final Role Environmental Impact Statement, Sec. III, p. 80 (1980).

¹¹ For example, there are numerous passages in the legislative history which support the preference requirement and contradict the DSI and federal respondents' arguments. See Appendix A.

tracts [§ 5(d) (1) (B)], a priority to nonfirm energy for the DSIs is not an increase in the amount of power but merely an improvement of "quality."

The Ninth Circuit held that the DSIs' entitlement to power is restricted by the Northwest Regional Act to their entitlements under their 1975 contracts. Since under their 1975 contracts the DSIs received nonfirm energy after the preference customers, an increase in priority for the DSIs would be an entitlement to a greater amount of power than allowed under the Northwest Regional Act. 686 F.2d at 712.

(4) The Northwest Regional Act created an exception to the preference of publicly-owned utilities to nonfirm energy for service to the DSIs' first quartile loads.

The Ninth Circuit held that Congress provided an explicit mandate for preference in the Northwest Regional Act. There is no express or implied indication in the Act that Congress intended to create an exception to override this mandate. 686 F.2d at 711-713.

CONCLUSION

The Ninth Circuit applied the appropriate standard for review and concluded that the four contract provisions are unauthorized by statute and unreasonable. The decision does not conflict with the decision of another Court of Appeals and does not call for an exercise of this Court's power of supervision. The decision affects only the contract provisions in question. The Petition should be denied.

Respectfully submitted,

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APPENDIX A

In the legislative history of the Northwest Regional Act, Congress repeatedly and unambiguously emphasized its reaffirmation of preference.

The House Committee of Interior and Insular Affairs states in its report:

"It is not, however, a purpose of this legislation to interfere in any way with, or modify, the statutory rights of preference customers either within or without the region." H. R. Rep. No. 96-976, Part II, 96th Cong. 2d Sess. p. 26.

"Sections 5 of S. 885 also contains provisions designed to insure that preference customers of BPA continue to have supply preference to the amount of resources to which the preference clause applies. The most significant of these is Section 5(a) which provides that all power sales by BPA pursuant to this legislation 'shall be subject at all times to the preference and priority provisions of the Bonneville Project Act of 1937.' * * * and, in particular, sections 4 and 5 thereof." * * * Taken together, these and other provisions of section 5 will make certain that all preference customer contract requirements will continue to have a priority over BPA sales to other customers." *Id.*, p. 34.

"Section 5(a) makes clear that all power sales under this bill are subject at all times to the Bonneville Project Act, particularly sections 4 and 5 of the Act. This provision therefore retains the preference and priority accorded public bodies and cooperatives in BPA power sales." *Id.*, p. 46.

"Section 10(c) expressly preserves the provisions of Federal laws by which public bodies and cooperatives are entitled to preference and priority in the sale of Federally generated electric power." *Id.*, p. 57.

The House Committee on Interstate and Foreign Commerce states in its Report:

"In marketing power generated at these Federal hydro projects, Congress provided that BPA is unequivocally obliged by statute to 'give preference and priority to public bodies and cooperatives' which terms are defined in section 3 of the Bonneville Project Act. Such public bodies and cooperatives are known as 'preference customers'. S. 885, as amended by this Committee, does not alter in any way that Congressionally-established obligation and priority, not [*sic*] does the Committee intend that the legislation be construed to alter or modify that obligation and priority." H. R. Rep. No. 96-976, Part I, 96th Cong. 2d Sess. p. 24.

"It [S. 885, as amended by the Committee] fully preserves the preference clause and the long-held statutory rights of preference customers." *Id.*, p. 27.

"a. Protection of the preference clause.

"Preference means the statutory priority to purchase Federally-generated electricity which has generally been provided to public bodies and rural electric cooperatives in over 32 Federal power marketing laws. These preference provisions date back to 1902 and were enacted to in-

sure that Federal hydroelectric generating facilities would be operated for the benefit of the general public. * * *.

"Concerns have been expressed that S. 885 might be construed to change the meaning or application of preference in the Northwest, and by precedent, nationally. However, the intention of this Committee is clear. The Committee does not want to undo nearly 80 years of history or establish any precedent. Specific provisions incorporated in the Committee amendment are designed to protect the entitlement of both existing and new preference customers to the full Federal base system. These provisions seek to protect preference as to both supply and price." *Id.*, pp. 33-34. (Emphasis in original.)

"Lastly, section 10(c) of the bill contains a disclaimer which flatly states that the bill does not 'alter, diminish, abridge, or otherwise affect,' either directly or indirectly, the preference provisions of other Federal laws. The Committee clearly intends no such construction of this Act by a court, Federal agency, or others that could affect in any way such provisions of law.

"The Committee believes that these and other safeguards adequately protect the preference clause and the long-held rights of preference customers in the Pacific Northwest and elsewhere." *Id.*, pp. 34-35.

"Section 5(a) makes clear that all power sales, including exchange sales, under this bill are subject at all times to the preference provisions of the Bonneville Project Act, as discussed earlier

in this report. These provisions retain and assure preference and priority in BPA power sales to public bodies and cooperatives. *Id.*, p. 59.

The Senate Report states:

"The preamble to section 5 is one of several savings provisions which appear in the bill to preserve the 'preference clause' of the Bonneville Project Act. The Committee is aware of no inconsistency between the provisions and intent of this Act and the existing preference clause of the Bonneville Project Act." S. Rep. No. 96-272, 96th Cong. 1st Sess. p. 26.

"*Section 10(d)*. — This section preserves the provisions of other Federal power marketing statutes by which public bodies and cooperatives are accorded preference and priority in the sale of power generated at federally-owned projects." *Id.*, p. 35.

As one example from the many statements made by congressmen concerning preference and the intent of the Act, Representative Swift, speaking in support of the bill that became the Act, said:

"Eighth. The bill does not violate the preference clause: The bill has been heavily amended to insure full protection of the traditional preference rights of public bodies and cooperatives. The Public Power Council, the National Rural Electric Cooperative Association and the American Public Power Association are in full agreement that the bill in its present form protects preference. And contrary to what some critics have alleged, the

bill does not enlarge the class of preference customers to include investor-owned utilities or the consumers served by IOU's; neither the power supplies nor the power costs of the IOU's or their customers are protected in the manner provided for preference customers." 126 Cong. Rec. H. 9851 (daily ed. September 29, 1980).

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KANDER L. STEVENS

No. 82-1071

In the Supreme Court of the United States

OCTOBER TERM, 1982

ALUMINUM COMPANY OF AMERICA, ET AL., PETITIONERS

v.

CENTRAL LINCOLN PEOPLES' UTILITY DISTRICT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS

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QUESTION PRESENTED*

Whether the court of appeals, in determining that the Bonneville Power Administration "unreasonably" interpreted its statutory mandate to supply federal power to nonpreference industrial customers, contravened established principles of judicial review and imposed a judicially created plan of power allocation in place of the carefully crafted statutory plan intended by Congress.

*The federal respondents include: Peter Johnson, Administrator of the Bonneville Power Administration, Donald Paul Hodel, Secretary of the Department of Energy, and the United States of America.

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BRIEF FOR THE FEDERAL RESPONDENTS

OPINIONS BELOW

The decision of the court of appeals (Pet. App. A-1 to A-14) is reported at 686 F.2d 708. The decision of the Administrator of the Bonneville Power Administration is reported at 46 Fed. Reg. 44340 (1981).

JURISDICTION

The judgment of the court of appeals was entered on April 6, 1982. The court of appeals' opinion was amended on September 7, 1982, and a petition for rehearing was denied on September 27, 1982. The petition for a writ of certiorari was filed on December 23, 1982. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Pacific Northwest Electric Power Planning and Conservation Act of 1980, 16 U.S.C. (Supp. V) 839 *et seq.* are set out at Pet. 1-4 and Pet. App. B-1 to B-75.

STATEMENT

1. Since the enactment of the Bonneville Project Act of 1937, 16 U.S.C. 832 *et seq.*, the federal government has provided low-cost hydroelectric power to public utilities, federal agencies, investor-owned utilities and direct service industrial customers (DSIs) in the Pacific Northwest. Although the 1937 Act granted a preference in the sale of such power to public utilities (16 U.S.C. 832c), for many years the Bonneville Power Administration (BPA) generated sufficient power to meet the purchasing requests of all customers. Until 1948, BPA's contracts with nonpreference customers (i.e., investor-owned utilities and DSIs) provided for supply of the full contractual amount of power on a "firm," non-interruptible, basis.¹ That situation changed, with respect to the DSIs, in 1948 when BPA modified its industrial sales policy to require, where feasible, that industries served directly by BPA take some nonfirm power together with firm power. G. Norwood, *Columbia River Power for the People, A History of the Policies of the Bonneville Power Administration* 161 (1981). This modification recognized the fact that nonfirm service could be of significant operational benefit by enabling BPA to interrupt the nonfirm portion of the DSI load to provide reserves for other customers. In this way, BPA could defer

¹"Firm" power is energy BPA can reliably expect to produce and must be plentiful enough to cover firm contractual obligations, such as utilities' loads. "Nonfirm" power is energy in excess of amounts that can reliably be expected; it is provided only when such excess exists, it is not guaranteed, and it is subject to interruption to protect service to firm obligations. See 16 U.S.C. (Supp. V) 839a(17).

the need to acquire additional generation. *Ibid.* See page 5 & note 2, *supra*.

The situation changed even more significantly in the 1970's. The growth of population and industry in the region had reached the point where projections showed that preference customers would soon require all of BPA's power, thus threatening to cut off all other customers. See H.R. Rep. No. 96-976 (Pt. I), 96th Cong. 2d Sess. (1980); Pet. App. D-61 to D-63. In light of these changed circumstances, BPA announced that firm power sales to investor-owned utilities would cease in 1973 (Pet. App. D-61). In 1975, BPA's contracts with DSIs specified that 25% of the power available to the DSIs (the so-called "first quartile") would be nonfirm, or subject to interruption. And in 1976 BPA issued Notices of Insufficiency to preference customers and informed DSI customers that their contracts would likely not be renewed (*id.* at D-62).

To avoid the results of this shortfall, and to prevent what was described as a "regional civil war" over access to federal power resources, Congress set about developing an equitable system of allocation. H.R. Rep. No. 92-976 (Pt. I), *supra*; Pet. App. D-1 to D-143. This effort culminated in the Pacific Northwest Electric Power Planning and Conservation Act of 1980, 16 U.S.C. (Supp. V) 839 *et seq.*, which sought to achieve its goals in several ways. While the public utilities would continue to have a preference (16 U.S.C. (Supp. V) 839c(a)), other provisions of the Act created boundaries for the application of that preference as defined by the allocation plan Congress created. That plan included the following components.

a. Investor-owned utilities were entitled to have BPA meet their full net firm requirements and to participate in the federal power program under an "exchange" arrangement (16 U.S.C. (Supp. V) 839c(b)(1) and (c)(1)). Such utilities could "swap" their own power, at average system

cost, for an equal amount of lower-priced federal power from BPA. In this way, residential customers of the private utilities would derive the benefits of cheaper power. H.R. Rep. No. 96-976 (Pt. I), *supra*, at 60; Pet. App. D-120 to D-121.

b. BPA was to recoup its cost of participating in the private utility power exchange by charging higher prices to DSIs. In return, the DSIs were afforded certain benefits: BPA was required to offer long-term contracts to its existing DSI customers for the full amount of power to which they were entitled under prior contracts entered into in 1975 (16 U.S.C. (Supp. V) 839c(d)(1)(B)). A significant difference between the new and old DSI contracts was greater reliability as to the power to be offered. Under the 1975 contracts, 25% of the power made available to the DSI's was "non-firm" or "interruptible," that is, BPA could restrict deliveries of this first "quartile" of power at any time. Thus, this first "quartile" was subject to interruption whenever a preference customer requested the power; in that event, it was sold to the preference customer rather than to the DSIs. In effect, this quartile of power was available on request to public utilities without any limitation on the preference customers' reasons for interrupting BPA's sales to DSIs.

Under the 1980 Act, however, this situation was changed. Rather than allowing unrestricted curtailment of the power available to the DSIs' first quartile, the Act provides that sales to DSIs "shall provide a portion of the Administrator's reserves for *firm power loads* within the region." 16 U.S.C. (Supp. V) 839c(d)(1)(A) (*emphasis added*). This definition of the reserve status of power available to DSIs enhanced the quality of the power by restricting the circumstances in which the flow of power could be interrupted. It therefore precluded the previous practice of interrupting service to make nonfirm sales to public utilities.

c. Rounding out the statutory allocation plan, the Act provided a preference for public utilities to satisfy their firm load needs. To solve the problem of assuring that BPA had sufficient power to satisfy its statutorily mandated contractual obligations to all classes of customers, the Act, for the first time, permitted BPA to acquire "sufficient resources * * * to meet [its] contractual obligations * * *," 16 U.S.C. (Supp. V) 839d(a)(2)(A).² In addition, to insure against the possibility that initial contracts under the Act would be challenged on the ground that preference rights were violated because BPA lacked adequate power to serve all of its customers, 16 U.S.C. (Supp. V) 839c(g)(7) provides that "[BPA] shall be deemed to have sufficient resources for the purpose of entering into the initial contracts * * *." See H.R. Rep. No. 96-976 (Pt. 1), *supra*, at 37, 64; Pet. App. D-82.

2. Following the enactment of the statute in 1980, BPA's Administrator offered long-term contracts to the DSIs as the Act required. Those contracts (Pet. App. H-1; emphasis added) permit BPA to

* * * restrict deliveries of Industrial Firm Power in amounts up to 25 percent of the Purchaser's Operating Demand, at any time and for any reason in order to protect *Bonneville's ability to meet its Firm Obligations* * * *. *Such restriction shall not be made for the purpose of selling nonfirm energy* * * *. Bonneville will treat the Purchaser's First Quartile as a firm load for purposes of resource operation, which firm load shall be subject to the restriction rights provided by this subsection.

²Prior to the 1980 Act, BPA had no general authority to augment its federally generated power by acquiring additional resources elsewhere. See Pet. App. D-62 to D-63.

In offering these terms, the Administrator explained (46 Fed. Reg. 44348 (1981)) that BPA would be providing the "amount of power equivalent" to that contained in the DSI's 1975 contracts for industrial firm power, as set forth in 16 U.S.C. (Supp. V) 839c(d)(1)(B), under changed conditions of interruption. The first quartile is to serve as a reserve for BPA's firm obligations; accordingly, the contract paraphrases the language of 16 U.S.C. (Supp. V) 839c(d)(1)(A). The Administrator noted that this proposal conformed with Congressional intent to serve 75% of the DSI load from BPA's own firm resources and to serve the first quartile "as if it were firm."³ The first quartile would be served as if it were firm when BPA's resource availability permitted; but BPA would interrupt it when needed to meet BPA's firm obligations to its other customers. Thus, the first quartile would serve as an operating reserve, as the House Report specified.⁴

3. Pursuant to the Act's provisions for judicial review (16 U.S.C. (Supp. V) 839f(e)), certain preference customers petitioned for review in the United States Court of Appeals for the Ninth Circuit.⁵ They contended that the Administrator's decision violated their rights to preference under Sections 5(a) and 10(c) of the Act, 16 U.S.C. (Supp. V) 839c(a)

³See S. Rep. No. 96-272, 96th Cong., 1st Sess. 59 (1979); Pet. App. F-74. The Administrator found a similar intent expressed in the House Report. H.R. Rep. No. 96-976 (Pt. II), 96th Cong., 2d Sess. 48 (1980); Pet. App. E-106 to E-107.

⁴H.R. Rep. No. 96-976 (Pt. I), *supra*; Pet. App. E-106 ("Approximately 25 percent of the DSI load is to be treated as a firm load for purposes of resource operation and will provide an operating reserve that may be restricted by BPA at any time in order to protect the Administrator's firm loads within the region • • •").

⁵Pursuant to Section 9(c)(1)(B) of the Act, 16 U.S.C. (Supp. V) 839f(e)(1)(B), sales of power under Section 5, 16 U.S.C. (Supp. V) 839c, constitute final agency action subject to judicial review.

and 839g(c); that BPA had offered the DSIs more power than the amount to which they were entitled under the 1975 contracts, in violation of Section 5(d)(1)(B) of the Act, 16 U.S.C. (Supp. V) 839c(d)(1)(B); and that BPA's administrative procedures were contrary to law.⁶

The Ninth Circuit rejected BPA's interpretation of the Act and voided the contract provisions that ensured that the first quartile would be available as a reserve to meet BPA's firm power loads. The court concluded that, because the sales of nonfirm power under the 1975 contracts were contingent upon availability and upon public utilities' requests for nonfirm power, the first quartile had not been "allocated" to the DSIs. Hence, the DSIs were not "entitled" to this amount under the 1975 contracts and it could not be offered to them now. Pet. App. A-6 to A-8.

In addition, the court held that, even if BPA correctly discerned Congress' intent to allocate the nonfirm power to the DSIs, BPA's interpretation was unreasonable. Pet. App. A-8.

DISCUSSION

The court of appeals has undone precisely what Congress intended to do when it passed the Act, namely, the creation of a statutory plan of allocation to remedy pressing energy problems facing the Pacific Northwest. Under the decision below, the allocation of low-priced federal hydroelectric power would effectively revert to the situation that existed with respect to the DSIs before the 1980 Act was passed; preference customers could at any time and for any reason interrupt the flow of power to the DSIs' first quartile. Thus, the orderly apportionment Congress intended would be

⁶The court of appeals did not reach the procedural issue (Pet. App. A-14 n.10) and it is not before this Court on the petition for a writ certiorari.

thrown into disarray. The DSIs would have no assurance of receiving power for their first quartile without a serious risk of interruption; and a significant portion of the power sold to DSIs could be diverted to preference customers at lower prices, in which event BPA would be deprived of revenues intended to subsidize the exchange program for residential customers of investor-owned utilities.

Even so, we recognize that this case may not satisfy the traditional criteria for certiorari. The decision below will affect only the Pacific Northwest; in addition, there is no conflict among the circuit courts.⁷ We note, on the other hand, that, because original jurisdiction is vested exclusively in the court of appeals for the region (16 U.S.C. (Supp. V) 839 f(e)(5)), there is no prospect of a direct conflict of decisions. Accordingly, it is unlikely that the court below will be persuaded to correct its misreading of the statute,⁸ especially given the absence of any clear guidance from this Court, which has had no occasion to consider preference clauses in a like context. Moreover, the practical fact is that the decision below could have a severe impact on the national economy: approximately one-third of the nation's total aluminum supply is produced by BPA's DSI customers, many of whom may terminate operations if the court of appeals' decision is not reversed.⁹ In addition,

⁷The decision below is, however, inconsistent with *Volunteer Electric Cooperative v. TVA*, 139 F. Supp. 22 (E.D. Tenn. 1954), aff'd, 231 F.2d 446 (6th Cir. 1956) (construing preference clause in TVA Act).

⁸Because Section 9(e)(5) of the Act, 16 U.S.C. 839f(e)(5), establishes a 90-day period from the date of agency action within which judicial review may be sought, there is no prospect that any court will have an opportunity to review the question presented by the contracts at issue here. Accordingly, unless the decision below is reversed, the Ninth Circuit's erroneous reading of the statute will be controlling for the 20-year life of the DSI contracts.

⁹One former DSI customer has already closed its plant in the region; three others have threatened to do the same.

BPA provides more than 50% of the power in the Pacific Northwest (H.R. Rep. No. 96-976 (Pt. II), *supra*, ¶26; Pet. App. E-68; S. Rep. No. 96-272, *supra*, at 17; Pet. App. F-37). In our view, these considerations justify granting the petition.

1. This area of federal regulation is obviously quite complex and Congress has delegated to BPA responsibility for implementing the Act and broad discretion with respect to the terms of sale and interruptibility of power to each class of customer. We submit the court of appeals failed to accord appropriate deference to BPA's expertise. Although it noted that BPA's position finds "[s]upport" in the legislative history (Pet. App. A-10 & n.7)—a conclusion that would ordinarily compel affirmance of the agency's decision—the court nevertheless supplanted the agency's interpretation with a judicially created plan of allocation.

The agency decision at issue here was made immediately following the Act's passage "by the men charged with the responsibility of setting its machinery into motion, of making the parts work efficiently and smoothly while they are yet untried and new," *Andrus v. Shell Oil Co.*, 446 U.S. 657, 667-668 (1980), quoting *Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294, 315 (1933), and is thus entitled to considerable weight. As this Court recently observed, "[w]e have often noted that the interpretation of an agency charged with the administration of a statute is entitled to substantial deference," *Blum v. Bacon*, No. 81-770 (June 14, 1982), slip op. 10. See also, e.g., *E.I. duPont de Nemours & Co. v. Collins*, 432 U.S. 46, 54-55 (1977); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 381 (1969); *Udall v. Tallman*, 380 U.S. 1, 16 (1965); *Investment Company Institute v. Camp*, 401 U.S. 617, 626-627 (1971). This principle is particularly compelling where, as here, the agency made major contributions to

Congress' consideration of the statute (see Pet. 14) and the terms of interruptibility contained in the contract provision at issue were brought to Congress' attention and expressly approved. See Pet. 14-15 & n.7; *United States v. Rutherford*, 442 U.S. 544, 554 n.10 (1979); *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 489 (1940); *Board of Governors v. First Lincolnwood Corp.*, 439 U.S. 234, 248, 251 (1978); *EEOC v. Associated Dry Goods Corp.*, 449 U.S. 590, 600 n.17 (1981).

Accordingly, the Ninth Circuit's rejection of BPA's interpretation cannot be reconciled with this Court's instruction that "[t]o sustain * * * [the agency's] application of this statutory term, we need not find that its construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings.'" *Udall v. Tallman*, *supra*, 380 U.S. at 16, quoting *Unemployment Compensation Commission v. Aragon*, 329 U.S. 143, 153 (1946). Here, the court has intruded upon the very complex area of the *terms* of hydroelectric power marketing. The opinion below—which relies almost exclusively upon incorrect technical characterizations at odds with those of the expert agency—does not faithfully execute this Court's holdings concerning review of agency statutory interpretation.

2. The court of appeals placed undue reliance on Section 5(a), 16 U.S.C. (Supp. V) 839c(a), which preserved the preferences recited in the 1937 Act. While Congress retained the existing public utility preference, Section 5(a) must be understood in the context of the 1980 legislation. That section is not the entirety of the Act and, if read in isolation, will produce a result quite at odds with the legislative purpose. For, if Congress had intended to perpetuate the preference without modification, no further legislation was

necessary; indeed, the entire 1980 statute would be redundant if it was intended to do nothing more than preserve the status quo under the 1937 Act. See H.R. Rep. No. 96-976 (Pt. I), *supra*, at 36-37; Pet. App. D-80 to D-81.

BPA recognizes the continued vitality of the preference provision and the agency's interpretation will preserve it just as Congress intended. Under the 1980 Act, BPA is required to offer contracts to certain nonpreference customers, including DSIs. Once these commitments have been satisfied, any further energy generated by BPA ("surplus" energy) is available for sale in accordance with the preference. Section 5(f), 16 U.S.C. (Supp. V) 839c(f). Thus, the surplus will be offered first to public utilities in accordance with the preference. But the court of appeals' opinion would strip the nonpreference customers of their statutory entitlement to purchase firm power by elevating the preference clause to a primacy Congress never intended. It was the threat that such an exercise of preference by public utilities would curtail sharply or eliminate BPA sales to other customers that led Congress to act.

Congress, moreover, was fully cognizant that the 1980 Act would modify the quantity of power whose allocation would be governed by preference rights in the region served by BPA. In response to stated concerns that the 1980 Act's allocation might be construed in a manner that would alter preference rights under other federal energy legislation affecting other regions of the country (Pet. App. D-76), the House Report stated its intention that the Act not "alter, diminish, abridge, or otherwise affect, either directly or indirectly, the preference provisions of *other* Federal [Power] laws." Pet. App. D-78, quoting Section 10(c), 16 U.S.C. (Supp. V) 839g(c) (emphasis added). See also Pet. App. D-143.

3. The court of appeals failed to recognize that the new DSI contracts are fully consistent with the statutory directive that existing DSIs be offered "an amount of power equivalent to that which such customer is entitled under its contract dated * * * 1975." Section 5(d)(1)(B), 16 U.S.C. (Supp. V) 839c(d)(1)(B). BPA's interpretation is in full accord with this legislative mandate. Accordingly, the new contracts provide the DSIs with the same amount of power to which they were previously entitled. That the new contracts improve the quality of first quartile power, by limiting the circumstances of interruption, does not alter the fact that the DSIs were entitled to the same total *amount* under the 1975 contracts. Nor is the improvement in quality inconsistent with the Act; it is in perfect consonance with the language of Section 5(b)(1), 16 U.S.C. (Supp. V) 839c(b)(1), and the statutory allocation that Congress created.¹⁰

4. The court of appeals decision will have a significant adverse impact on the government as well as on BPA's nonpreference customers. By way of illustration, under the Act's residential exchange program BPA is obligated to swap an equivalent amount of low-cost federal power with investor-owned utilities for the benefit of residential users. In the first year (fiscal 1982) following passage of the Act, the net cash benefit of this exchange to the private utilities was \$216,592,967. The same figure, of course, represents the amount of loss BPA incurred in the exchange. When these costs are projected over the life of the DSIs' 20 year contracts, BPA estimates an aggregate cost of \$10 billion. The Act specifies that this shortfall is to be funded principally by

¹⁰Section 5(b)(1), 16 U.S.C. (Supp. V) 839c(b)(1) defines the public utilities' preference in terms of "electric power to meet the *firm power load* of such public body" (emphasis added).

sales to DSIs.¹¹ Yet, if the flow of first quartile power to DSIs is subject to unlimited interruption by preference customers, as the decision below envisions, the anticipated revenues will not be recovered from the DSIs.

This loss would lead to several foreseeable results: BPA will incur a significant revenue shortfall which would require BPA to defer payments it is scheduled to make to the United States Treasury (see Dep't of Energy Order RA 6120.2, "Power Marketing Administration Financial Reporting," (Sept. 9, 1979)) Section 7(a)(2)(A); 16 U.S.C. (Supp. V) 839e(a)(2)(A)) to recoup the shortfall, BPA will have to seek increases in rates paid by other customers, thereby depriving residential users in the region of the full benefits of low-cost federal power; or, BPA will have to acquire, by the purchase of generation from new generating units or by other commercial purchase, additional power to meet its contractual obligations, with these costs being borne either by the government or BPA's customers.¹² All of these eventualities share a common element: each would thwart Congress' stated intent to make low-cost federal power available in the region in accordance with the statutory plan of allocation.

¹¹Section 7(c)(1)(A) of the Act, 16 U.S.C. (Supp. V) 839e(c)(1)(A), specifies that the costs BPA incurs from the exchange with private utilities are to be recovered from DSIs "to the extent that such costs are not recovered through rates applicable to other customers." Under the Act, DSI rates will be computed differently before and after 1985, but both calculations assume a high average availability of first quartile power as essential to fulfill the Act's goals. See S. Rep. No. 96-272, *supra* at 59; Pet. App. F-74.

¹²The amount of power at issue in this case is approximately 1,000 megawatts. The Department of Energy estimates that the cost of constructing a nuclear power plant with this capacity would be between two and three billion dollars. See Federal Respondents' Reply to Preference Customers' Response to Petition for Rehearing at 2-3.

We note, in addition, that many of the DSIs are in the economically troubled aluminum industry. Reduced availability of power to the DSIs' first quartile will necessarily have an adverse effect by increasing the likelihood of plant closures.¹³ These plant closures will in turn give rise to the possibility that additional DSIs will similarly shut their operations if the remaining DSIs are required to assume the full cost of exchange. In the event that the DSIs are unable to—or for any reason do not—pay the exchange costs, the impact will be felt by the federal treasury when BPA defers its repayment obligations. As a result, BPA operations would cause an enormous drain on federal funds, a consequence Congress clearly did not intend when it created the balanced plan of allocation and payment contained in the Act.

¹³See note 9, *supra*.

CONCLUSION

The petition for a writ of certiorari should be granted.
Respectfully submitted.

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FEBRUARY 1983

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ROBERT C. STEVENS,
CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1982

ALUMINUM COMPANY OF AMERICA, et al.,
Petitioners,

v.

CENTRAL LINCOLN PEOPLES' UTILITY DISTRICT, et al.,
Respondents,

and

PETER JOHNSON, as Administrator of the Bonneville
Power Administration, Department of Energy,
and DONALD PAUL HODEL, as Secretary of the
Department of Energy, and the
UNITED STATES OF AMERICA,
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals
For the Ninth Circuit

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

Rather than respond to arguments raised in the Petition,
Respondents simply summarize the Ninth Circuit's Opinion

—albeit inaccurately in important respects.¹ Respondents² rely upon Section 9(e)(5) of the Act, 16 U.S.C. § 839f(e)(5), which provides the Ninth Circuit with exclusive original jurisdiction to review agency action, in offering two principal reasons for denying certiorari:

1. The impossibility of conflicts among the Courts of Appeal; and
2. The need for this Court to defer to the Ninth Circuit's statutory expertise.

Neither argument succeeds.

Given the Act's exclusive jurisdiction provision, it is obvious—and Petitioners have readily conceded—that no actual circuit conflicts can develop. However, precisely because such actual conflicts are statutorily precluded, it is important that this Court review Ninth Circuit decisions under the Act which conflict in principle with decisions of other Courts of Appeal under analogous federal power marketing statutes. In this regard, Respondents fail meaningfully to address Petitioners' arguments that the Ninth Cir-

¹For example, Respondents suggest that the Ninth Circuit "held" the subject contract provisions violate not only the Act's "preference clause," but also its limitation on the "amount of power" allocated Petitioners. This is a plain mischaracterization of the Opinion. The Ninth Circuit studiously avoided construing the phrase "amount of power," even though Petitioners argued that their statutory allocation of an "amount of power" was dispositive of the Ninth Circuit's preference analysis (Pet., pp. 25-27). Respondents' attempt now to suggest a second decisional basis for the Opinion is without merit.

²Of the parties listed as Respondents (Pet., pp. ii-iii), only the publicly-owned and cooperative utilities have filed a brief opposing certiorari (joined by the Public Power Council, the association to which these utilities belong). The Federal Respondents have filed a brief supporting Petitioners and asking that certiorari be granted.

cuit's Opinion regarding the meaning and application of preference rules under the Act directly contravenes the Sixth Circuit's affirmance in *Volunteer Electric Cooperative v. Tennessee Valley Authority*, 139 F. Supp. 22 (E.D. Tenn. 1954), *aff'd* 231 F.2d 446 (6th Cir. 1956)—the only other decision identified below involving a federal power marketing statute that, like the Act, specifically confers rights to power on both preference and nonpreference customers. Contrary to Respondents' suggestion, the Opinion is not supported by prior Ninth Circuit caselaw. *Santa Clara v. Andrus*, 572 F.2d 660 (9th Cir. 1978), *cert. denied sub nom. Pacific Gas & Electric Co. v. Santa Clara*, 439 U.S. 859 (1978), upon which the Ninth Circuit principally relied, struck down the sale of power to a nonpreference private utility under a federal statute that contained only a preference clause and provided no allocation of power to nonpreference customers. Neither *Santa Clara* nor any other cases cited by Respondents arise under statutes that allocate power directly to nonpreference customers, and thus simply do not bear upon analysis of this distinctive feature of the Act.³

Volunteer Electric Cooperative, on the other hand, arose under the TVA Act, a statute like the Act that contains both a preference clause and a provision specifically authorizing the sale of power to nonpreference industrial

³However, these cases do make clear that even in the absence of direct statutory allocation to nonpreference customers, a "preference clause" does not override other important statutory provisions and purposes (Pet., pp. 16-17). Thus, if anything, these cases further demonstrate that the Ninth Circuit's sweeping view of preference under the Act is plain error.

customers.⁴ Neither the district court nor the Sixth Circuit had difficulty upholding TVA's adherence to this statutory scheme against challenge from preference customers:

Granted the Act states preference shall be given to states, counties, municipalities and cooperatives not organized for profit. However the Act does not end there.

139 F. Supp. at 26.

In short, the Ninth Circuit's Opinion raises a clear conflict regarding the meaning of "preference" under federal power marketing statutes that specifically confer rights to power on both preference and nonpreference customers.

Nor do Respondents demonstrate any need for this Court to defer to the Ninth Circuit's "expertise" in this first case arising under the Act. Centralized initial review of agency decisions in one Court of Appeals is a wholly unexceptional jurisdictional scheme, which was not intended to oust this Court from review and which could not endow the Ninth Circuit with any special understanding of the Act's many technical provisions. Indeed, development of such expertise has always been thought an administrative task, recognized by time-honored principles of judicial review requiring that reasonable interpretations of a statute by the administering agency be upheld. Respondents' assertion that Petitioners merely ask this Court to substitute its views for those of the Ninth Circuit is frivolous. On the contrary, Petitioners seek to resurrect Congress's carefully integrated statutory scheme, and to

⁴Indeed, while the TVA Act merely authorizes sales to nonpreference industrial customers the Act requires such sales, thus providing an even stronger affirmation of nonpreference customer rights to power.

assure that review by the Ninth Circuit hereafter is properly confined. The Ninth Circuit's utter failure to understand that BPA properly implemented Congress's instructions regarding the "amount of power" to be allocated Petitioners under the new contracts (Pet., pp. 25-27) is but one example of the danger inherent in Respondents' suggestion that this Court allow the Ninth Circuit complete latitude in exercising its "expertise" under this new and highly technical statute.³

Dated: March 15, 1983

Respectfully submitted,

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of America, et al.

³To persuade the Court that this case lacks importance, Respondents urge that under present economic circumstances Petitioners would not use all the power allocated to them even were the Ninth Circuit's Opinion reversed. This assertion is completely irrelevant to consideration of the Petition. It has always been true that BPA customers, including Respondents as well as Petitioners, decline to purchase power to which they are otherwise entitled during periods when such power cannot productively be used. At issue here, however, are Petitioners' rights to obtain statutorily allocated power as needed during the term of their twenty-year contracts — a term that will span periods of economic vitality as well as recession.

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PETITIONERS' BRIEF

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QUESTION PRESENTED

Did the Ninth Circuit, in determining that BPA "unreasonably" interpreted its statutory mandate to supply federal power to nonpreference industrial customers, contravene established principles of judicial review and improperly burden Congress's plenary authority to prescribe the scope and application of statutory preference rules?

LIST OF PARTIES AFFECTED

Petitioners Aluminum Company of America, Georgia Pacific Corporation, Pennwalt Corporation, Reynolds Metals Company, Intaleo Aluminum Corporation, Crown Zellerbach Corporation, Hanna Nickel Smelting Company, Alumax Pacific Corporation, Kennecott Corporation, ARCO Metals Company, Kaiser Aluminum & Chemical Corporation, Pacific Carbide & Alloys Company, Oregon Metallurgical Corporation, and Martin-Marietta Aluminum Company are direct service industrial customers ("DSIs") of the Bonneville Power Administration.* Petitioners DSIs appeared as Respondents-Intervenors before the Ninth Circuit.

Respondents Public Utility District No. 1 of Chelan County, Public Utility District No. 1 of Cowlitz County, Public Utility District No. 1 of Douglas County, Public Utility District No. 1 of Snohomish County, Public Utility District No. 2 of Grant County, City of Seattle, City Light Department, and City of Tacoma, Department of Public Utilities, are municipal corporations organized and existing under the laws of the State of Washington. Respondents Central Lincoln Peoples' Utility District, Clatskanie Peoples' Utility District, Northern Wasco County Peoples' Utility District, and Tillamook Peoples' Utility District are public corporations organized and existing under the

*Petitioners' parents, subsidiaries (except wholly owned subsidiaries), and affiliates are listed in Appendix R to the petition for writ of certiorari.

laws of the State of Oregon. Respondent Eugene Water & Electric Board is a part of the City of Eugene, a municipal corporation organized and existing under the laws of the State of Oregon. Respondents public utilities appeared as Petitioners before the Ninth Circuit. Respondent Public Power Council is a non-profit corporation organized and existing under the laws of the State of Washington, consisting of over one hundred publicly owned and cooperative electric utilities. Respondent Public Power Council appeared as a Petitioner-Intervenor before the Ninth Circuit.

Respondents Portland General Electric Company, CP National Corporation, Pacific Power & Light Company, Puget Sound Power and Light Company, Montana Power Company, and Idaho Power Company are investor-owned utilities ("IOUs") who buy power from BPA for resale to consumers in the Pacific Northwest. Respondents IOUs intervened below and were aligned by the Ninth Circuit as Petitioners-Intervenors. However, their position on the merits before the Ninth Circuit was contrary to the position of the publicly owned utilities.

Respondent Peter Johnson is the Administrator of the Bonneville Power Administration, a federal agency within the Department of Energy. Respondent Donald Paul Hodel is the Secretary of the Department of Energy, an agency of the United States. Federal Respondents appeared as Respondents before the Ninth Circuit and, as is apparent from the briefs and the Opinion below, were aligned on the merits with the DSIs. Federal Respondents supported the DSIs' petition for writ of certiorari.

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| Bonneville Project Act of 1937, 16 U.S.C. §§ 832-832l ("Project Act"): | |
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| Pacific Northwest Electric Power Planning and Conservation Act, 16 U.S.C. §§ 839-839h ("Regional Act") [Cert. A., at B]: | |
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| Section 3(17) [16 U.S.C. § 839a(17)] | <i>passim</i> |
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| "Regional Preference Act" of 1964, 16 U.S.C. §§ 837-837h (Pub. L. 88-552): | |
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| House Committee on Interstate and Foreign Commerce, Pacific Northwest Electric Power Planning and Conservation Act, H.R. REP. NO. 976(I), 96th Cong., 2d Sess. [Cert. A., at D] | <i>passim</i> |
| House Committee on Interior and Insular Affairs, Pacific Northwest Electric Power Planning and Conservation Act, H.R. REP. NO. 976(II), 96th Cong., 2d Sess. [Cert. A., at E] | <i>passim</i> |
| Senate Committee on Energy and Natural Resources, Pacific Northwest Electric Power Planning and Conservation Act, S. REP. NO. 272, 96th Cong., 1st Sess. (1979) [Cert. A., at F] | <i>passim</i> |
| <i>Pacific Northwest Electric Power Issues: Hearings Before the Subcomm. on Energy and Power of the Comm. on Interstate and Foreign Commerce, House of Representatives, on H.R. 13931, 95th Cong., 2d Sess. (1978) (statement of Jack Speer, Anaconda Company) [Cert. A., at O]</i> | <i>34</i> |

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| <i>Pacific Northwest Electric Power Supply and Conservation: Hearings on S. 2080 Before the Senate Comm. on Energy and Natural Resources, 95th Cong., 2d Sess. (1978) (statement of Gordon C. Culp, Counsel, Pacific Northwest Utilities Conference Committee)</i> | 2 |
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| 125 CONG. REC. S3997-99 (daily ed. Apr. 5, 1979) (remarks of Sen. Jackson) | 31, 35 |
| 125 CONG. REC. S11,592 (daily ed. Aug. 3, 1979) (remarks of Sen. Hatfield) [Cert. A., at C] | 2, 46 |
| 126 CONG. REC. H9848-49, H9864 (daily ed. Sept. 29, 1980) (remarks of Rep. Dingell and Rep. Foley) [Cert. A., at G] | 5, 15, 46 |
| 126 CONG. REC. H10,676, H10,678 (daily ed. Nov. 17, 1980) (remarks of Rep. Udall and Rep. Foley) [Cert. A., at L] | 26, 36 |
| 126 CONG. REC. S14,690-91, S14,698 (daily ed. Nov. 19, 1980) (remarks of Sens. Jackson and McClure) [Cert. A., at J] | 30 |
| 126 CONG. REC. E5092 (daily ed. Dec. 1, 1980) (remarks of Rep. Swift) | 4 |

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| BPA, <i>Draft Environmental Impact Statement on the Role of the Bonneville Power Administration in the Pacific Northwest Power Supply System</i> (DES-77-21) (July, 1977) [Cert. A., at F] | 3, 9, 13, 47 |
| Letter of BPA Administrator to Hon. Abraham B. Kazen (Aug. 19, 1980), VIII Contract Official Record 2334-2351 [Cert. A., at I] | <i>passim</i> |

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| DSI-BPA Meeting Dec. 11, 1980, Remarks of Gjelde, I Contract Official Record 254-290 | 33 |
| BPA, <i>Final Environmental Impact Statement on the Role of the Bonneville Power Administration in the Pacific Northwest Power Supply System</i> (DOE/EIS- 0066) (12/80) <i>passim</i> | |
| BPA's Notice of Public Participation in Negotiation of Initial Long-Term Power Sales and Certain Other Contracts (46 Fed. Reg. 18,331) (1981) (V Contract Official Record 1097-99) | 18 |
| BPA's Notice of Draft Prototype Power Sales Con- tract Interpreting Policy Provisions of Pacific Northwest Electric Power Planning and Conserva- tion Act: Publication of Summary of BPA's Pro- posed Contract Provisions and Request for Public Comment (46 Fed. Reg. 31,238) (1981) (VI Contract Official Record 1475, 1490-96) [JA 68-80] | 19 |
| BPA, <i>Administrator's Record of Decision, 1981 Whole- sale Power Rate Proposal IV-14 to IV-16</i> (June 1981) | 33 |
| BPA's Staff Evaluation of Public Comments in Response to BPA's Prototype Power Sales Con- tracts and Residential Purchase and Sale Agree- ment (X Contract Official Record 2640, 2686-88, 2692- 96) [JA 91-103] | 26, 46 |
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| BPA's Notice of Final Action Concerning Power Sales and Residential Exchange Contracts Required by Pacific Northwest Electric Power Planning and Con- servation Act (46 Fed. Reg. 44,340) (1981) (IX Con- tract Official Record 2355-59) [JA 81-90] | 13, 18, 19 |
| BPA, 1982 <i>Annual Report</i> | 47 |

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| Cohen, <i>Efficiency and Competition in the Electric Power Industry</i> , 88 YALE L.J. 1511 (1979) | 10 |
| Fereday, <i>The Meaning of the Preference Clause in Hydroelectric Power Allocation Under the Federal Reclamation Statutes</i> , 9 ENVTL. L. 601 (1979) | 15 |
| Mellem, <i>Darkness to Dawn? Generating and Conserving Electricity in the Pacific Northwest: A Primer on the Northwest Power Act</i> , 58 WASH. L. REV. 245 (1983) | passim |
| Redman, <i>Nonfirm Energy and BPA's Industrial Customers</i> , 58 WASH. L. REV. 279 (1983) | 9 |
| Redman, <i>Preference and Other Clauses in Federal Power Marketing Acts</i> , 13 ENVTL. L. 773 (1983) | 15 |

No. 82-1071

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1983

ALUMINUM COMPANY OF AMERICA, et al.,
Petitioners,

v.

CENTRAL LINCOLN PEOPLES' UTILITY DISTRICT, et al.,
Respondents,
and

PETER JOHNSON, as Administrator of the BONNEVILLE
POWER ADMINISTRATION, Department of Energy,
and DONALD PAUL HODEL, as Secretary of the
DEPARTMENT OF ENERGY, and the
UNITED STATES OF AMERICA,
Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

PETITIONERS' BRIEF

OPINION BELOW

The Ninth Circuit's Opinion as amended, reported at 686 F.2d 708, appears in Appendix A to the petition for writ of certiorari.

JURISDICTION

The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). The Ninth Circuit's Opinion was rendered on April 6, 1982 [JA 53]* and thereafter amended by Order dated September 7, 1982 [JA 66]. A timely petition for rehearing was denied on September 27, 1982 [JA 67], and a petition for certiorari was filed thereafter within 90 days. The Court entered its Order granting the petition for writ of certiorari on March 28, 1983.

STATUTORY PROVISIONS INVOLVED

This case involves the Pacific Northwest Electric Power Planning and Conservation Act ("Regional Act"), Pub. L. No. 96-501, 94 Stat. 2697, 16 U.S.C. §§ 839-839h (1980). Relevant provisions of the Regional Act are set forth in the petition for writ of certiorari at pp. 1-4. The entire text of the Regional Act is set forth in Appendix B to the petition for writ of certiorari.

STATEMENT OF THE CASE

1. Introduction

Federal electric power is marketed under a variety of laws applicable to different agencies, projects, and geographic areas. Each law establishes the conditions under which power may be sold to different customers. This is the first case under the newest and most unusual federal power marketing law, the Pacific Northwest Electric Power Planning and Conservation Act ("Regional Act"), 16 U.S.C.

*The appendix to the petition for writ of certiorari is cited herein as "Cert. A." and the joint appendix is cited as "JA". Documents from the administrative record are cited to the appropriate volume and page of the Contract Official Record ("COR").

§§ 839-839h (1980) [Cert. A., at B], described by its Congressional sponsors as “[w]ithout any doubt . . . the most important bill ever to have affected the Pacific Northwest.”¹

Under many laws Congress has simply delegated to an administrative agency authority to sell power to any requesting customer, requiring only that the agency allocate this power first to publicly owned and cooperative utilities (“preference customers”) when it lacks sufficient power to satisfy the competing demands of preference and nonpreference customers. The Regional Act’s distinctive feature is that it directs by statute the manner in which the Bonneville Power Administration (“BPA”) must supply power to individual customers—preference and nonpreference customers alike—rather than leaving BPA to allocate this power administratively. The issue presented is whether BPA reasonably interpreted the Regional Act as having committed the power here in dispute to nonpreference industrial customers, thereby insulating that power from claim by preference utilities.

2. History and Nature of the Dispute

Prior to the Regional Act, BPA marketed power to “preference” customers (publicly owned and cooperative utilities) and “nonpreference” customers (investor-owned utilities [“IOUs”], federal agencies, and direct service industries [“DSIs”])² under contracts authorized by the Bon-

¹125 CONG. REC. S11,592 (daily ed. Aug. 3, 1979) (remarks of Sen. Hatfield) [Cert. A., at C].

²The DSIs are electroprocess industries who located in the Northwest primarily during wartime when demand for strategic materials was great and power to produce these materials was not readily available elsewhere. The DSIs became customers of BPA—rather than customers of utilities—at the request of the federal government. The DSIs produce at their Northwest facilities some 30% of the nation’s primary aluminum, 100% of the nation’s domestically mined nickel, and substantial quantities of other strategic materials. *Pacific Northwest Electric Power Supply and Conservation Act: Hearing on S. 2080 Before the Senate Comm. on Energy and Natural Resources, 95th Cong., 2d Sess. 92 (1978)* (statement of Gordon C. Culp, counsel, Pacific Northwest Utilities Conference Committee).

neville Project Act of 1937 ("Project Act"), 16 U.S.C. §§ 832-832i (1976 & Supp. V 1981). Under the Project Act Congress did not create statutory power entitlements for individual customers, but rather authorized BPA to sell power to any requesting customer provided that priority be given to preference customers if power was insufficient to satisfy "conflicting or competing" applications.³

Through the early 1970s BPA had sufficient power to meet all customer demands, and thus had no occasion to allocate power. All regional consumers received low cost federal power whether they were served by preference or nonpreference utilities. In addition, by retaining certain contract rights to interrupt service to the DSIs, BPA was able to develop operating techniques for its hydroelectric system that increased power production, provided low cost reserve power, and reduced rates for all customers. These techniques were made possible solely by the ability of DSI electroprocess loads—unique among BPA's loads—to withstand intermittent interruptions in power service.⁴

By the mid-1970s projections indicated BPA's loads would soon exceed its power supplies. Under the Project Act, BPA lacked authority to acquire more power and was constrained to allocate to preference customers all power not otherwise committed by contract. Thus, BPA

³This "preference clause" is contained in Section 4(b) of the Project Act, 16 U.S.C. § 832c(b), and is incorporated by reference in the Regional Act, 16 U.S.C. § 839c(a). See pp. 13-14 *infra*.

⁴See p. 8 *infra*. In addition to the specific efficiencies made possible through interruption of DSI loads, service to the DSIs has reduced the cost of power for regional consumers by allowing BPA to achieve early economies of scale, and by returning to BPA revenues in excess of service costs. BPA's data show that the DSIs historically have paid rates 22-45% above their cost of service. BPA, U.S. Department of Interior, *Draft Environmental Impact Statement on the Role of the Bonneville Power Administration in the Pacific Northwest Power Supply System* ("DEIS") (DES-77-21) Appendix C, Table IV-55 at IV-142 (July 1977).

halted firm sales to nonpreference utilities when their contracts expired in 1973, announced in 1975 that new DSI contracts would not be offered when existing DSI contracts expired between 1981 and 1991, and began planning its first administrative allocation of power among preference utilities, whose individual needs BPA could not fully meet.⁵

BPA's inability to serve nonpreference utilities deprived half the region's consumers of low cost federal power, while BPA's inability to continue serving the DSIs jeopardized DSI operations and threatened to deny BPA important operating efficiencies that reduced rates for all customers. Moreover, while BPA's allocation program was intended to enable utilities to plan for and meet their remaining needs with non-federal power, it only intensified efforts to secure shares of the federal hydro power.⁶ All customer groups prepared for costly and protracted litigation, thereby rendering impossible final administrative allocation of existing power supplies and delaying vital planning decisions.⁷

The Regional Act was designed to forestall this enveloping regional struggle over an administrative power alloca-

⁵See House Committee on Interstate and Foreign Commerce, Report ("*House Commerce Report*"), H.R. REP. 976 (I), 96th Cong., 2d Sess. 24-25 (1980) [Cert. A., at D-61 to D-63]; House Committee on Interior and Insular Affairs, Report ("*House Interior Report*"), H.R. REP. No. 976 (II), 96th Cong., 2d Sess. 30-31 (1980) [Cert. A., at E-74 to E-76]; Senate Committee on Energy and Natural Resources, Report ("*Senate Report*"), S. REP. No. 272, 96th Cong., 1st Sess. 17 (1979) [Cert. A., at F-38]. Because the Senate accepted the House amendments to S.885, the bill which became the Regional Act, no House/Senate conference committee report was ever prepared. 126 CONG. REC. E5092 (daily ed. Dec. 1, 1980) (remarks of Rep. Swift).

⁶See *House Commerce Report*, at 25-26 [Cert. A., at D-63 to D-64].

⁷See, e.g., *House Commerce Report*, at 23-27 [Cert. A., at D-60 to D-66]; *House Interior Report*, at 26-32 [Cert. A., at E-68 to E-78].

tion by legislating power entitlements for all customers.⁸ Congress required BPA to offer initial twenty-year contracts to both preference and nonpreference customers, "specif[ying] directly how much power each class of BPA customer is to receive, and at what cost,"⁹ and granted BPA authority to acquire power to meet its new obligations. By creating statutory entitlements for individual customers, Congress obviated the need for BPA to allocate power during the term of the initial contracts. Preference rules were retained in the Regional Act to govern BPA's administrative allocation of all uncommitted power.¹⁰

BPA was continuously consulted by Congress in drafting the Regional Act, interpreted its provisions throughout the four-year legislative process, and implemented those provisions through contracts offered to regional customers. As statutorily directed, BPA offered new contracts to each utility—both preference and nonpreference—for power sufficient to meet that utility's net "firm power load," but not for any power that is excess to that utility's "firm power load." In addition, BPA offered new contracts to each DSI for a specified "amount of power," portions of which could be interrupted to protect BPA's "firm power loads" from temporary shortages.

⁸Rep. Foley summed up the urgent need for legislation:

[A]llocation of Federal power cannot be avoided; the only issue is whether the reallocation will be legislated by Congress or performed administratively by the Administrator of BPA. An administrative allocation will be fought over for years in the courts because the amount of Federal power is sufficiently large and its cost is sufficiently low that none of the utilities or the industries served [sic] directly by BPA can afford not to take part in the impending courtroom battles. Without a legislative allocation of Federal power, disruption in the region is virtually inevitable.

House Commerce Report, at 31 [Cert. A., at D-72].

⁹126 CONG. REC. H9864 (daily ed. Sept. 29, 1980) (remarks of Rep. Foley).

¹⁰See pp. 16-18, 26-28, 34-36, and 41-44 *infra*.

The provisions of the new DSI contracts governing BPA's right to restrict 25% (the "first quartile")¹¹ of each DSI's power reflect a change in the scope of BPA's restriction rights, and it is this change that is at issue here. Under its pre-Regional Act contracts with DSI customers (the "1975 contracts"), BPA had the right to restrict first quartile power "at any time" [Cert. A., at N-5]. When BPA exercised this right, the power thereby made available was either used to protect BPA's firm power loads from shortages, or was sold as "surplus" power that certain preference utilities—enjoying a priority right to uncommitted power—purchased for resale to entities other than their own retail customers. Under its new DSI contracts, BPA retains the right to restrict first quartile power when necessary to protect its firm power loads, but not to provide preference utilities with "surplus" power.

In September 1981, certain preference utilities challenged in the United States Court of Appeals for the Ninth Circuit ("Ninth Circuit") the first quartile restriction provisions of the new DSI contracts, claiming those provisions violate preference by denying them priority to a portion of the power BPA uses to serve the DSIs' first quartile. BPA and the DSIs argued that this change in first quartile restriction rights is mandated by the Regional Act: by limiting to the protection of BPA's "firm loads" the purposes for which first quartile power may be restricted, the Regional Act now commits this power to the DSIs and prohibits BPA from restricting the DSIs' first quartile in order to sell surplus power to preference utilities. Although acknowledging that BPA's statutory interpretation found support in the Regional Act's legislative history, the Ninth Circuit nonetheless found that interpretation "unreasonable" and found the disputed contract provisions to violate preference.

¹¹To define its restriction rights, BPA divides the DSI load into quartiles, each equal to approximately 25% of the DSI load.

3. BPA's Hydroelectric Operations and Power Sales Contracts Prior to the Regional Act

a. Power Operations and DSI Service under the 1975 Contracts

Between enactment of the Project Act in 1937 and of the Regional Act in 1980, the Federal Columbia River Power System grew to include thirty dams supplying half the power in the Northwest. During those years, BPA developed techniques for managing the flow of water through this system in a manner that increased power production and revenues, and reduced costs for all BPA customers. These techniques for enhancing system efficiency depend on—and have been implemented largely through—BPA's contract rights to restrict delivery of power to the DSIs. To determine whether BPA reasonably interpreted provisions of the Regional Act governing its rights to restrict power under the new DSI contracts, it is necessary to understand certain features of BPA's hydro system and its service of DSI loads prior to the Regional Act.

Hydroelectric power is generated by water falling through turbines. The quantity of power generated depends on the volume of water, which depends in turn on stream-flow levels produced by rain and melting snow. "Firm" power is power whose production can be assured even if streamflows turn out to be no greater than their historically worst or "critical" levels. "Nonfirm" power is the additional power that can be produced if streamflows exceed "critical levels" but whose production therefore cannot be assured.¹²

Although BPA can determine with reasonable accuracy how much firm power will be available during the operating

¹²BPA, U.S. Department of Energy, *Final Environmental Impact Statement on the Role of the Bonneville Power Administration in the Pacific Northwest Power Supply System* ("EIS") (DOE/EIS-0066) IV-69 to IV-70 (Dec. 1980).

year,¹³ its ability to determine how much nonfirm power will be available—and therefore its ability to rely on using this power to serve customer loads—is limited by the enormous fluctuation in streamflow levels from year to year.

BPA's utility customer loads—homes, hospitals, schools and offices—are “firm power loads” for which power must be made continuously available.¹⁴ Thus, BPA cannot plan to meet its obligations to utilities with nonfirm power, whose production is uncertain. Among BPA's customers only DSI electroprocess loads can withstand intermittent interruptions in power service without causing serious disruption or damage to production facilities. This feature of DSI loads enables BPA to enhance the efficient operation of its hydro system in two important respects:

First, it permits BPA to plan to serve a portion of the DSI load (the first quartile) with nonfirm power when ample streamflows make such power available, while reserving the right to interrupt first quartile

¹³Historical records enable BPA to calculate the firm energy its hydro system can produce in any given year. Using the concept of critical water planning, BPA assumes its hydro system will be able to produce at least the quantity of energy that would be produced during the time that it takes to draft reservoirs from full to empty (the “critical period”), if the streamflows that feed those reservoirs are the lowest on historical record (“critical” streamflows). The energy that could be produced during this critical period is referred to as “Firm Energy Load Carrying Capability” or “FELCC.” See *id.* at D-8; Mellem, *Darkness to Dawn? Generating and Conserving Electricity in the Pacific Northwest: A Primer on the Northwest Power Act*, 58 WASH. L. REV. 245, 269-70 (1983).

¹⁴See *Senate Report*, at 26 [Cert. A., at F-53]; Mellem, *supra* n. 13 at 251 n. 47. Utility efforts since the Ninth Circuit's decision to develop loads that can be served with nonfirm power are not relevant to the legal issues presented here. BPA is not obligated under its Regional Act contracts to supply utilities with nonfirm power for any purpose, see 16 U.S.C. § 839c(b)(1) and *infra* p. 17, and such loads are not “firm power loads” for whose benefit the Regional Act authorizes BPA to restrict DSI power. 16 U.S.C. §§ 839c(d)(1) (A), 839a(17).

service if "critical" streamflows occur. In this manner BPA uses available nonfirm power to serve a regional load and avoids the cost of acquiring additional firm generating resources to serve that load.¹⁵ Use of non-firm power to serve the DSIs' first quartile also makes possible reservoir operating techniques that expand available storage capacity on BPA's hydro system and enable BPA to produce more power.¹⁶

Second, because DSI loads are interruptible, BPA can create low cost power "reserves" through its con-

¹⁵Assuming service to the DSIs' first quartile as prescribed by the Regional Act, *see* p. 28, *infra*, BPA projected it could provide the DSIs 96% average power availability without needing firm generating resources for first quartile service. *See, e.g., Senate Report*, at 59 [Cert. A., at F-74].

¹⁶Reservoir storage on the Columbia River is limited, permitting BPA to control only a small fraction of the natural streamflow in a typical year. If BPA can manage its reservoirs to capture more streamflow, it can increase total power production. DEIS, *supra* n. 4, at Appendix A, II-12, II-42 to II-48. Use of nonfirm power to serve the DSIs' first quartile enables BPA to expand useable reservoir storage and thus produce more power. Nonfirm power, when available at all, normally is available only during spring and summer. Because BPA uses nonfirm power to serve the DSIs' first quartile, it must supply the DSIs with other power during the fall and winter. BPA can produce such power by having the DSIs "borrow" firm power from water stored in reservoirs for future service to the DSIs themselves. By creating more storage space in the reservoirs—a bigger "hole"—before the spring rains and snow melt occur, this technique permits BPA to capture more water in its reservoirs if streamflows turn out to be ample. Because DSI loads are interruptible, BPA can secure this "borrowed" firm power by restricting the DSIs' future firm power if critical streamflows leave BPA with too little water to meet its firm power sales obligations to utilities. *See* EIS, *supra* n. 12, at IV-89 to IV-91; Mellem, *supra* n. 13, at 271-73; Redman, *Nonfirm Energy and BPA's Industrial Customers*, 58 WASH. L. REV. 279, 282-85 (1983). Mr. Redman is one of the authors of this brief.

tract rights to restrict DSI power.¹⁷ All power systems require reserves to protect customer loads; BPA's method of creating reserves is unique, and substantially reduces system costs. In other regions, reserves are provided through costly standby generating facilities that produce power and earn revenue only infrequently.¹⁸ BPA's alternative permits most Northwest generating facilities to earn revenues continuously, thus minimizing the power plants needed to serve regional loads and reducing costs for all customers.¹⁹

¹⁷Although this case involves only BPA's right to restrict delivery of nonfirm power to the first quartile, BPA may also restrict other portions of the DSI load for reserve purposes. BPA can interrupt the entire DSI load instantaneously to avert cascading generating failures (such as the New York City blackouts), and can interrupt half the DSI load to protect utilities from BPA forced outages and peak load problems. In addition, BPA can interrupt the "second quartile" to protect utilities from the delayed completion or poor performance of new BPA power sources, including conservation programs. BPA can interrupt the "third quartile" to secure firm power previously "borrowed" for first quartile service. *See, e.g., House Interior Report*, at 48 [Cert. A., at E-106 to E-107]; Mellem, *supra*, n.13, at 268-69; DSI Contract (1981) § 7, XIV COR 3784-3800 [Cert. A., at H-1 to H-9] [JA 108]. These restriction rights apply to portions of the DSI load served with "firm" as well as "nonfirm" power.

¹⁸Cohen, *Efficiency and Competition in the Electric-Power Industry*, 88 YALE L.J. 1511, 1515 and n.21 (1979) (Reserve capacity's "capital cost is a major item in the rate base of most utilities. . . . A study prepared in 1975 for the New York interconnected system assessed the cost of meeting the 'one day in 10 years' [power plant failure] standard at \$1.6 billion."); EIS, *supra* n. 12, at IV-86.

¹⁹*See* Letter of BPA Administrator to Hon. Abraham B. Kazen ("Kazen Letter") (Aug. 19, 1980), VIII COR 2339-2340 [Cert. A., at I-9] ("Thus, . . . the fact that the DSI power is nonfirm saves the region the need for another 1.7 conventional power plants. . . . This is one reason why, from a rate impact standpoint, it is beneficial for other consumers that the DSIs are part of the regional power system in the Northwest." *See also* EIS, *supra* n. 12, at IV-86.

Although significantly modified in the Regional Act,²⁰ BPA rights to restrict DSI power were incorporated in the DSIs' 1975 contracts. Under those contracts²¹ each DSI received a specified "amount" of "industrial firm power," which was a mix of firm and nonfirm power.²² That amount was measured in kilowatts of contract demand and was sufficient to serve each DSI's entire load.²³ BPA was obligated to make this specified amount of power "continuously available,"²⁴ but retained the right to restrict the first quartile of this power "at any time."²⁵ By serving the DSIs' first quartile with nonfirm power while charging the DSIs a firm power rate,²⁶ BPA secured substantial operational and revenue benefits while using its then-scarce firm power to serve its other loads.

²⁰See pp. 17, 28-34 *infra*.

²¹The 1975 contracts, known as "Industrial Firm" contracts, could not be executed because of BPA's then-anticipated power shortage and the Project Act's preference clause. By "interim letter agreements" BPA and the DSIs operated in accordance with the 1975 contracts temporarily until new contracts were signed pursuant to the Regional Act. EIS, *supra* n. 12, at IV-79.

²²XXIII COR 6278 [Cert. A., at N-2]. BPA planned "firm" generating resources to serve three quartiles or approximately 75% of the DSI load with "firm" power, and planned to serve one quartile of this load—the "first quartile"—primarily with nonfirm power. Bernard Goldhammer Memorandum, Exhibit C to Preference Customer Memorandum, filed Nov. 2, 1981, at 5-6 [JA 43]; EIS, *supra* n. 12, at I-15.

²³Section 4 of the 1975 contracts ("Sale of Power and Amount Sold") sets forth the "amount of power" allocated to each DSI. XXIII COR 6278-79 [Cert. A., at N-2].

²⁴General Rate Schedule Provisions § 1.4, XXIII COR 6290 [JA 112].

²⁵Section 8(b) of the General Contract Provisions of the 1975 contracts ("Restriction of Deliveries") sets forth this restriction right. XXIII COR 6305 [Cert. A., at N-5]. See pp. 8-10 *supra*.

²⁶Schedule IF-1 Wholesale Power Rate For Industrial Firm Power, XXIII COR 6285 [Cert. A., at N-3].

Because BPA could interrupt the DSIs' first quartile "at any time" under the 1975 contracts, this power could be used by BPA as a reserve for the protection of BPA's firm load obligations or sold as "surplus" power in accordance with the Project Act's preference rules. However, when first quartile power was restricted for either purpose, BPA was obligated to pay the DSIs "availability credits" (retroactive rate reductions) that would enable them to purchase non-federal replacement power.²⁷

b. Service to Utilities

Both prior to and under the Regional Act BPA has provided its utility customers—preference and nonpreference utilities alike—with higher quality service than the DSIs. BPA has no right to interrupt power deliveries to these customers (except for *force majeure*) and is obligated to supply firm power sufficient to meet any portion of their loads that cannot be met with power that they themselves produce. Since only a few of BPA's preference utility customers own generating resources, BPA supplies most of these customers with firm power for their entire loads.²⁸

Because utility loads are met with firm power,²⁹ BPA has never been contractually obligated to supply utilities with nonfirm power. However, prior to the Regional Act, certain preference utilities that owned generators found they could save money by purchasing the nonfirm power made available as "surplus" when BPA interrupted the DSIs' first quartile under the 1975 contracts. By purchasing this power at low nonfirm power rates (rather than the higher rate paid by the DSIs), and using it to serve that

²⁷See, e.g., *id.*; see also General Contract Provision § 10, XXIII COR 6310-12 [Cert. A., at N-5 to N-7]; Kazen Letter [Cert. A., at I-5]; *House Commerce Report*, at 61-62 [Cert. A., at D-122 to D-124].

²⁸See p. 17 *infra*. Of the 116 preference utilities BPA served in 1978, only 18 owned generators. EIS, *supra* n. 12, at I-14.

²⁹See p. 8 *supra*.

portion of their loads normally supplied with power from their own generators, these utilities could sell their own power—now “displaced” with BPA’s nonfirm power—to other utilities at higher prices. By displacing their own power, utilities owning generating resources were able to arbitrage federal power to other entities.³⁰

Displacement is the economic heart of this legal dispute. Although utilities have never been contractually entitled to BPA’s nonfirm power, preference utilities enjoy a priority right to purchase “surplus” BPA power. Because under the 1975 contracts the nonfirm power used to serve the DSIs’ first quartile could be restricted “at any time” upon BPA’s payment to the DSIs of availability credits, preference utilities could exercise their priority rights to purchase this power as “surplus” and use it for displacement and arbitrage purposes. The disputed provisions of the new DSI contracts limit BPA’s right to restrict the DSIs’ first quartile power, thereby committing this power to the DSIs and rendering it unavailable for purchase as “surplus” by preference generating utilities.

c. Operation of Preference Rules under the Bonneville Project Act

Prior to the Regional Act, BPA power was sold under the Project Act. Section 5(a) of the Project Act, 16 U.S.C. § 832d(a), authorizes BPA to sell power to all requesting customers, but requires BPA to include in all contracts certain provisions for the benefit of public bodies and cooperatives.³¹ Section 4 of the Project Act requires BPA to give priority to public bodies and cooperatives when

³⁰See, e.g., DEIS, *supra* n. 4, at IV-71 [JA 29]. This practice was quite limited until the early 1970s when utilities built the first coal and nuclear plants in the Northwest. Power “displaced” from these plants is sold to Southwest utilities, who save oil and gas by shutting down their generators when nonfirm power is available from the Northwest. See, e.g., EIS, *supra* n. 12, at IV-71 to IV-73.

³¹For example, BPA contracts must be limited to 20 years’ duration and BPA must retain the right to cancel contracts with private utilities (although not the DSIs) on five years’ notice.

power is insufficient to satisfy the competing demands of both public and private customers:

[I]n the event that . . . there shall be conflicting or competing applications for an allocation of electric energy between any public body or cooperative on the one hand and a private agency of any character on the other, the application of such public body or cooperative shall be granted.

16 U.S.C. § 832c(b).

Two aspects of the Project Act's preference rules bear upon analysis of this case. First, while limiting BPA's ability to execute new contracts during periods of power shortage, those rules did not derogate BPA's obligation to perform in accordance with contracts already executed. Section 5(a) of the Project Act expressly provides:

Contracts entered into under this subsection shall be binding in accordance with the terms thereof and shall be effective for such period or periods, including renewals or extensions, as may be provided therein. . . .

16 U.S.C. § 832d(a).

Thus, preference rules only governed BPA's allocation of power not otherwise lawfully committed by contract; while BPA was required to offer uncommitted power to preference utilities and to deny new contracts to nonpreference customers if power shortages arose, preference rules neither required nor permitted BPA to breach existing contracts by failing to deliver power committed thereunder.³²

Second, even prior to the Regional Act BPA operated under laws that granted certain BPA nonpreference customers priority to power over certain BPA preference customers. Congress enacted these laws precisely to ensure

³²Thus, as Congress noted, the DSIs' pre-Regional Act contracts would have remained binding until they expired. See *House Interior Report*, at 28-29 [Cert. A., at E-70 to E-72].

a different distribution of BPA power than would have obtained under the Project Act's preference rules alone.³³

4. The Regional Act: Purpose and Structure

The Regional Act became law on December 5, 1980, following four years of legislative effort. Its provisions committing power to individual preference and nonpreference customers represent a "regionally-negotiated 'peace' settlement"³⁴ designed to address three critical problems:³⁵

(i) BPA's statutory inability to augment existing power supplies;

(ii) BPA's inability under the Project Act's preference rules to offer new contracts to nonpreference utility and industrial customers, resulting in the denial

³³For example, since 1964 BPA has been prohibited from selling to preference customers in the Southwest power for which there is demand by Northwest customers (including nonpreference customers). 16 U.S.C. §§ 837-837h. *See, e.g.*, 112 CONG. REC. S25,779 (1966) (remarks of Sen. Mansfield) ("Public law 88-552 was designed to prevent this type customer [i.e., a preference customer] in one region from having a preference over the nonpreference users in the area where the power was to be generated—in those instances where there was a demand by the nonpreference users in the area of origin.") Since 1944 BPA has been obligated to observe a "geographical preference" for Montana customers (including nonpreference customers) in the sale of power from Hungry Horse Dam. 43 U.S.C. § 593a; this was reaffirmed in Pub. L. 88-552, 16 U.S.C. § 837h, and in the Regional Act, 16 U.S.C. § 839g(f).

More generally, preference rules simply do not affect rights to power that are determined by statute. *See* p. 41 *infra*. Compare Fereday, *The Meaning of the Preference Clause in Hydroelectric Power Allocation Under the Federal Reclamation Statutes*, 9 ENVTL. L. 601 (1979); (discussing preference rules but not statutory commitments to nonpreference customers) with Redman, *Preference and Other Clauses in Federal Power Marketing Acts*, 13 ENVTL. L. 773 (1983) (discussing preference rules in light of statutory commitments of power to nonpreference customers).

³⁴126 CONG. REC. H9864 (daily ed. Sept. 29, 1980) (remarks of Rep. Foley) [Cert. A., at G-3].

³⁵*House Commerce Report*, at 27-28 [Cert. A., at D-66 to D-68].

of low cost federal power to many regional consumers and threatening to deny BPA significant operating efficiencies and additional revenues; and

(iii) the prospect of protracted litigation over BPA's administrative allocation of federal power.

The Regional Act overcomes these problems by legislating power entitlements for all preference and nonpreference customers—thereby eliminating the need for an administrative allocation of this power in accordance with preference rules—and by granting BPA authority to acquire the power necessary to meet these statutory obligations.

Under the Regional Act, BPA is required to offer initial long-term contracts to all customers: preference utilities, private utilities, federal agencies, and existing DSIs.³⁶ Subsequent contracts with each of these customers are authorized but not required.³⁷ While reaffirming the Project Act's preference provisions,³⁸ Congress simultaneously “deemed” the initial mandated contracts to be supported by a sufficiency of power, thereby using a legal fiction to clarify that these initial contracts are immune from preference challenge.³⁹ By statutorily committing power

³⁶16 U.S.C. § 839c(g)(1). Congress consistently described these initial contracts as “required”. See, e.g., *House Interior Report*, at 32, 34, 48 [Cert. A., at E-78 to E-79, E-81, E-106]; *House Commerce Report*, at 27-28, 34, 64 [Cert. A., at D-66 to D-67, D-76, D-126 to D-127]; *Senate Report*, at 33 [Cert. A., at F-66 to F-67].

³⁷See, e.g., 16 U.S.C. § 839c(d)(1)(A) (permanent authorization for BPA to serve existing DSIs); see also *House Commerce Report*, at 61 [Cert. A., at D-122] (“Subsequent contracts with these DSIs are authorized but not mandated.”). Subsequent contracts would be governed by Regional Act provisions other than those that apply only to the initial contracts.

³⁸16 U.S.C. § 839c(a). See pp. 26, 34, 41 *infra*.

³⁹16 U.S.C. 839c(g)(7). See pp. 27, 35 *infra*. This section was added at the same time as the Regional Act's preference provisions, see generally *Senate Report*, at 5 [§ 5(c)(1)] [Cert. A., at F-11 to F-12], 12 [§ 9(c)(2)] [Cert. A., at F-27 to F-28], expressly “to ensure that a challenge . . . [on preference clause grounds] to the

under initial mandated contracts rather than leaving BPA to allocate this power administratively in accordance with preference rules, Congress intended to provide a period of regional peace during which BPA could utilize its new authority to acquire power sufficient to meet the needs of all customers.⁴⁰

Congress specified each customer's statutory power entitlements under these initial mandated contracts. For preference utilities, private utilities, and federal agencies, the contracts are to provide power sufficient to meet the customer's net firm power loads.⁴¹ The DSI contracts are to provide each DSI with the same "amount of power" specified in its 1975 contract,⁴² and are to provide BPA with power "reserves" to protect its "firm power loads."⁴³ Such reserves are to be provided through "specific contract provisions" permitting BPA "to interrupt, curtail, or otherwise withdraw . . . portions of" the DSI power when "needed to avert particular planning or operating shortages for the benefit of firm power customers of the Administrator."⁴⁴

All utilities may also offer to sell BPA, at their "average system cost" of resources, amounts of power not to exceed their residential and farm consumer loads, and are entitled to receive in exchange equal amounts of BPA power at the lowest rate BPA offers to preference customers.⁴⁵ This

initial contracts required to be offered under this Act will not be sustained." *House Commerce Report*, at 64 [Cert. A., at D-126 to D-127]. See also, *id.* at 37 [Cert. A., at D-81 to D-83].

⁴⁰See *House Commerce Report*, at 37 [Cert. A., at D-81 to D-83].

⁴¹16 U.S.C. §§ 839c(b)(1), (3). Utilities that own generating resources must use their power to supply their own loads; BPA is required to supply these utilities only the net additional power needed to serve their firm loads. *House Interior Report*, at 33-34 [Cert. A., at E-80 to E-81]; *House Commerce Report*, at 59 [Cert. A., at D-119]; See also Mellem, *supra* n. 13, at 249-50, 255-57.

⁴²16 U.S.C. § 839c(d)(1)(B). See pp. 24-25 and 28 n. 86 *infra*.

⁴³16 U.S.C. § 839c(d)(1)(A). See pp. 25-26 and 28 *infra*.

⁴⁴16 U.S.C. § 839a(17).

⁴⁵16 U.S.C. § 839c(c).

residential power "exchange" program provides rate relief for residential and farm consumers purchasing power from nonpreference utilities and thus cures a major part of the power allocation problem that prompted passage of the Regional Act.⁴⁶ Exchanging utilities are required to pass savings through to their consumers in the form of lower rates.⁴⁷ The costs to BPA of this exchange program are to be recovered in large part through higher rates charged to the DSIs.⁴⁸

Power that remains *after* BPA has satisfied its obligations to all customers under the mandated contracts may be sold as "surplus," to which preference utilities have priority under the preference rules of the Project Act.⁴⁹

5. The Proceedings Below

The Regional Act required BPA to offer initial contracts to all customers within nine months of its effective date.⁵⁰ BPA published procedures for and conducted contract negotiations,⁵¹ and thereafter timely offered these initial con-

⁴⁶See *House Interior Report*, at 35 [Cert. A., at E-82 to E-83]. This "exchange" program was designed for nonpreference utilities not otherwise eligible to buy power at BPA's preference customer rates. See *id.*; *House Commerce Report*, at 60 [Cert. A., at D-120 to D-121].

⁴⁷16 U.S.C. § 839c(c)(3).

⁴⁸16 U.S.C. § 839c(c)(1). See p. 47 n. 119 *infra*. See, e.g., *House Interior Report*, at 35 [Cert. A., at E-82 to E-83]; *House Commerce Report*, at 29 [Cert. A., at D-69]; Kazen Letter, VIII COR 2335 [Cert. A., at I-2 to I-3].

⁴⁹16 U.S.C. § 839c(f). See pp. 27, 29 *infra*. The remaining sections of the Regional Act constrain BPA's exercise of its new power purchase and conservation authority. See *generally*, Mellem, *supra* n. 13, at 246-47.

⁵⁰16 U.S.C. § 839c(g)(1).

⁵¹46 Fed. Reg. 44,340 (Sept. 3, 1981), IX COR 2355-59 [JA 81]; 46 Fed. Reg. 18,331 (Mar. 25, 1981), V COR 1097-99. Respondents argued below that BPA failed to follow its pre-Regional Act procedures regarding changes in its power marketing policies, see p. 50 n. 123 *infra*, not that BPA failed to adhere to the procedures it adopted for negotiating the Regional Act contracts.

tracts to all utility, federal agency, and DSI customers on August 28, 1981.⁵²

On August 31, 1981, Respondent preference utilities filed an action in the Ninth Circuit challenging the lawfulness of numerous provisions of the DSI contracts.⁵³ The Ninth Circuit denied Respondents' motion for a stay, but granted the request of BPA and the DSIs for expedited consideration.⁵⁴ Thereafter, Respondents narrowed their challenge to Section 7(c) and three related provisions of the DSI contracts governing BPA's right to restrict first quartile power.⁵⁵

On April 6, 1982, the Ninth Circuit issued its decision in favor of Respondents preference utilities, holding that the disputed contract provisions violate the Regional Act's preference rules by limiting BPA's rights to restrict delivery of nonfirm power to the DSIs' first quartile, thus denying Respondents priority to this nonfirm power.⁵⁶ This Opinion neither analyzes nor even mentions those provisions of the Regional Act that direct BPA to supply the DSIs with a specified "amount of power," protect that power from preference challenge, and prohibit BPA from

⁵²46 Fed. Reg. 44,340 (Sept. 3, 1981), IX COR 2355 [JA 82]. The negotiations were open to the public. BPA also held hearings and published explanations for all proposed contract provisions. *Id.* [JA 84]. Preference utility arguments concerning the first quartile restriction rights here at issue were presented and rejected in the negotiation process and in the formal proceeding to determine BPA's rates. BPA, *Administrator's Record of Decision, 1981 Wholesale Power Rate Proposal IV-14 to IV-16* (June 1981).

⁵³See p. 25 n. 79 *infra*.

⁵⁴Order dated September 11, 1981.

⁵⁵Second Amended Complaint, dated October 29, 1981, at 6 [JA 22]; see p. 25 n. 79 *infra*.

⁵⁶The Opinion declined to reach two issues raised by Respondents: that the disputed contract provisions provide the DSIs a greater "amount of power" than authorized under the Regional Act, and that they were adopted in violation of BPA's pre-Regional Act public comment procedures for administrative changes in power marketing policy. *Central Lincoln Peoples' Utility District v. Johnson*, 673 F.2d 1076, 1083 n. 9 [JA 53]. See p. 50 n. 123 *infra*.

selling nonfirm power to utilities as surplus until all BPA's contract obligations have been met.⁵⁷

The DSIs and the United States sought rehearing and rehearing en banc. On September 7, 1982, the Ninth Circuit modified its Opinion, adding a new footnote 4.⁵⁸ It then denied rehearing and rehearing en banc⁵⁹ but granted the DSIs' motion to stay issuance of the mandate until 14 days after this Court's final disposition of the case.⁶⁰

The DSIs filed their petition for certiorari in this Court on December 22, 1982. The United States filed a brief in support of the petition on February 4, 1983. Respondents preference utilities filed a brief in opposition to the petition on March 4, 1983. By this Court's Order of March 28, 1983, the petition for certiorari was granted.

SUMMARY OF ARGUMENT

Federal power is federal property that Congress may dispose of as it considers appropriate.⁶¹ In the Regional Act, Congress committed power directly to individual customers by statute rather than leaving that power to be allocated administratively by BPA under the Project Act preference provisions. This case turns on a single issue of statutory construction: did Congress commit the disputed power to the DSIs, or intend this power to be uncommitted "surplus" available for administrative allocation in accordance with preference rules? Because the Ninth Circuit missed the fundamental distinction between a statutory commitment and an administrative allocation of power, it misunderstood the provisions of the Regional Act that

⁵⁷16 U.S.C. §§ 839c(d)(1)(B), 839c(g)(7), 839c(f).

⁵⁸Order Amending Opinion [JA 66].

⁵⁹Order Denying Petition for Rehearing [JA 67].

⁶⁰Order filed October 12, 1982. Pending this Court's final disposition of the case, however, BPA is operating its hydro system and delivering power in accordance with the Opinion. Respondents' Memorandum of Law 1-2, filed October 4, 1982.

⁶¹*Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 330, 338 (1936). *Accord Alabama v. Texas*, 347 U.S. 272, 273 (1954).

commit this power to the DSIs and protect that commitment from preference challenge.

The DSIs' power commitment is bounded by four statutory requirements. First, BPA is required to offer initial contracts to all customers, including the DSIs and other nonpreference customers.⁶² Second, BPA must make continuously available to each DSI the same "amount of power" specified in the 1975 contracts, except when BPA is authorized to restrict delivery of this power.⁶³ Third, BPA is authorized to restrict the DSIs' first quartile power to protect BPA's firm loads from shortages, but not for other purposes.⁶⁴ Fourth, BPA must meet its contract obligations to the DSIs and all other customers before offering any power for sale as surplus in accordance with preference rules.⁶⁵

The DSIs' power commitment reflected in their new contracts is precisely that which Congress prescribed in the Regional Act; BPA is obligated to make continuously available to each DSI the same amount of power specified in the 1975 contracts, and is entitled to restrict the first quartile of that power in order to protect its firm loads. The operative language of the challenged contract provisions was drafted by BPA prior to passage of the Regional Act, shared with Congress through years of legislative consideration, required by the statute, and endorsed in the legislative history.⁶⁶ All three Congressional committee reports confirm that Congress intended these contract provisions in order to maximize efficient operation of hydro system resources and make possible wholesale rate parity

⁶²16 U.S.C. § 839c(g)(1).

⁶³16 U.S.C. § 839c(d)(1)(B).

⁶⁴16 U.S.C. §§ 839c(d)(1)(A), 839a(17).

⁶⁵16 U.S.C. § 839c(f).

⁶⁶*See, e.g.,* Kazen Letter, *supra* n. 19, at Appendix III, VIII COR 2350 [Cert. A., at I-23]; Memorandum regarding "BPA Obligations With Respect To DSI Top Quartile" (Feb. 12, 1981), XXV COR 6748-50 [Cert. A., at K]; 16 U.S.C. §§ 839a(17), 839c(b)(1) (A); n. 67 *infra*.

for residential consumers through the Northwest.⁶⁷ BPA's implementation of this statutory directive through contract provisions that use Congress's very language was reasonable under the relevant standard of review.⁶⁸

Presuming that Congress did not intend a statutory commitment of power to nonpreference customers absent an "explicit exception" to preference,⁶⁹ the Ninth Circuit misconceived both the nature of the DSIs' power commitment and the function of preference rules under the Regional Act. All the power used to serve the DSIs' first quartile—whether firm or nonfirm—has been statutorily committed to the DSIs except when needed to protect BPA's firm loads from shortages.⁷⁰ By limiting to the protection of BPA's firm loads the purposes for which first quartile power may be restricted, Congress changed the DSI's power commitment from their 1975 contracts, under which first quartile power could be restricted "at any time."

Preference rules govern the administrative allocation of uncommitted power when that power is insufficient to satisfy the competing demands of preference and nonpreference customers, but do not determine rights to power that already has been lawfully committed.⁷¹ Congress's

⁶⁷*House Interior Report*, at 48 [Cert. A., at E-106 to E-107]; *House Commerce Report*, at 52, 61-62 [Cert. A., at D-107, D-122 to D-123, D-135]; *Senate Report*, at 23, 27-28, 59-60, 69 [Cert. A., at F-47 to F-48, F-55 to F-56, F-74 to F-76, F-89].

⁶⁸*See, e.g., American Paper Inst. v. American Electric Power Service Corp.*, — U.S. —, 51 U.S.L.W. 4547, 4552 (May 17, 1983); *Federal Election Comm'n v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 39 (1981); *CBS v. Federal Communications Comm'n*, 453 U.S. 367, 382 (1981).

⁶⁹*See p. 41 infra.*

⁷⁰16 U.S.C. §§ 839c(d)(1)(A), 839a(17).

⁷¹*See, e.g.,* Sections 4(b) and 5(a) of the Project Act, 16 U.S.C. §§ 832c(b), 832d(a); *City of Anaheim v. Kleppe*, 590 F.2d 285 (9th Cir. 1978); *Volunteer Electric Coop. v. Tennessee Valley Authority*, 139 F. Supp. 22 (E.D. Tenn. 1954), *aff'd*, 231 F.2d 446 (6th Cir. 1956); *Citizens Utilities Co. v. United States*, 149 F.

very purpose in committing power to nonpreference customers under initial mandated contracts was to achieve in the Regional Act a distribution of Northwest power that otherwise would have been precluded by existing preference rules.⁷² When Congress adopted provisions reaffirming the preference rules of a prior law, it simultaneously adopted a provision “deeming” BPA to have sufficient power for all initial mandated contracts.⁷³ Congress’s use of this legal fiction most powerfully demonstrates its intent to immunize the power committed under the initial contracts from preference claims,⁷⁴ yet the Ninth Circuit first ignored and then mischaracterized this important provision.⁷⁵

By rejecting outright BPA’s interpretation of technical statutory provisions, the Ninth Circuit has remade Congress’s carefully integrated power allocation plan and significantly impaired BPA’s ability to achieve the long-term regional benefits that plan was designed to achieve.

ARGUMENT

1. The Regional Act Expressly Commits the Disputed Power to the DSIs and Protects that Power From Preference Claims

a. Statutory Overview

The disputed DSI contract provisions follow directly from the Regional Act, which—

Supp. 158 (Ct. Cl.), *cert. denied*, 355 U.S. 892 (1957); *House Commerce Report*, at 27-28 [Cert. A., at D-66 to D-67].

⁷²See, e.g., *House Commerce Report*, at 36-37, 64 [Cert. A., at D-80 to D-82, D-126 to D-127].

⁷³16 U.S.C. § 839c(g)(7).

⁷⁴See, e.g., *House Commerce Report*, at 36-37, 64 [Cert. A., at D-80 to D-82, D-126 to D-127].

⁷⁵The Ninth Circuit’s original Opinion failed even to discuss the “deemed” sufficiency provision. In amending its Opinion the Ninth Circuit summarily dismissed this provision without analyzing or even suggesting its statutory purpose [JA 66]. See p. 39 n. 110 *infra*.

(1) requires BPA to offer initial contracts to all preference and nonpreference customers, including the DSIs [16 U.S.C. § 839c(g)(1)];

(2) requires BPA to supply each DSI with a specified "amount of power" sufficient for its full load [16 U.S.C. § 839c(d)(1)(B)];

(3) authorizes BPA to restrict DSI power when needed to protect BPA's "firm loads" from shortages, but not for any other purpose [16 U.S.C. §§ 839c(d)(1)(A), 839a(17)]; and

(4) prohibits BPA from selling any power—firm or nonfirm—until all obligations under the initial mandated contracts have been met [16 U.S.C. § 839c(f)].

The Regional Act reaffirms the Project Act's preference provisions to guide BPA's allocation of all power not committed under the initial mandated contracts [16 U.S.C. § 839c(a)], but protects those contracts from challenge on preference grounds [16 U.S.C. § 839c(g)(7)].

b. Congress Committed to the DSIs a Specified "Amount of Power" Subject to Restriction for the Protection of BPA's "Firm Loads"

Under the Regional Act each DSI's power commitment has two components: power quantity and power quality. Power quantity is determined by the size of each DSI's load, as measured in kilowatts of contract demand. Power quality is determined by BPA's rights to interrupt delivery of power to portions of that load. All other BPA customers are committed power for their full loads without interruption; the character of the DSIs' power commitment is unique and follows from Congress's desire to secure important operating and revenue benefits by capitalizing on the ability of DSI loads to withstand interruptions.

Section 5(d)(1)(B) of the Regional Act governs DSI power quantity: it requires BPA to provide each DSI the

same "amount of power" specified in its 1975 contract.⁷⁶ Under Section 4 ("Sale of Power and Amount Sold") of the 1975 contract BPA made "continuously available" to each DSI a specified "amount of power" measured in kilowatts, sufficient to serve that DSI's full load.⁷⁷ Accordingly, under Section 5 ("Amount of Power") of the new contract BPA makes "continuously available" to each DSI this same "amount of power" measured in kilowatts, sufficient to serve its full load.⁷⁸ This power quantity provision of the new contracts was not challenged.

Rather, Respondent preference utilities challenged power quality provisions of the new DSI contract that permit BPA to restrict first quartile power only to protect BPA's "firm power loads."⁷⁹ The new contract provisions change BPA's right under the 1975 contracts to restrict first quartile power "at any time" without limitation on the purposes of the restriction. This change in restriction rights is mandated by the plain language of the Regional Act: Sections 5(d)(1)(A) and 3(17) expressly require that power sales to the DSIs "provide a portion of the

⁷⁶16 U.S.C. § 839c(d)(1)(B).

⁷⁷XXIII COR 6278 [Cert. A., at N-2].

⁷⁸The 1975 contracts also provided each DSI additional amounts of power, called "technological allowances," for purposes other than plant expansion (*e.g.*, pollution control). Congress expressly intended that this practice be continued, and the amount of power granted the DSIs under their new contracts is the number of kilowatts to which they were entitled under their 1975 contracts plus any additional kilowatts for technological allowances granted since 1975. *Senate Report*, at 28 [Cert. A., at F-56]; *House Commerce Report*, at 63 [Cert. A., at D-125 to D-126]; Respondents' Memorandum in Opposition to Motion for Temporary Injunction or Stay Pending Review, filed September 9, 1981, Table I [JA 20].

⁷⁹Respondents challenged four separate provisions of the new DSI contracts [Sections 7(c), 7(e)(6), 8(a)(2), and 8(c)(9)], all relating to and implementing this limitation on the purpose for which BPA can restrict first quartile power. XIV COR 3787 [Cert. A., at H-1]; XIV COR 3800, 3807, 3822 [JA 109-10]. See p. 28 *infra*.

Administrator's reserves for firm power loads in the region," through "specific contract provisions" permitting BPA to interrupt portions of the DSIs' power to protect BPA's "firm power customers" from "shortages."⁸⁰ The "specific contract provisions" at issue here squarely implement this statutory language.

c. The Regional Act's Preference Provisions Do Not Affect The DSIs' Power Commitment

The Regional Act structure confirms that the DSIs' statutory power commitment is not affected by the preference provisions retained in the Act.⁸¹ First, Congress mandated initial contracts for all customers including the DSIs, thereby committing power by statute to nonpreference cus-

⁸⁰16 U.S.C. §§ 839c(d)(1)(A), 839a(17); X COR 2694-95 [JA 100-101].

⁸¹The preference provisions of the Project Act are reaffirmed in Section 5(a) of the Regional Act, 16 U.S.C. § 839c(a). Section 10(c) of the Regional Act, 16 U.S.C. § 839g(c), is a savings clause for the preference provisions of "other" federal power marketing laws. Section 10(c) was enacted to reassure preference customers in other regions who feared that the Regional Act—by mandating contracts for and committing power directly to nonpreference customers—would weaken their rights under federal power marketing statutes applicable to them. *See, e.g., House Commerce Report*, at 34 [Cert. A., at D-76 to D-78]. *Cf.* 126 CONG. REC. H10,676 (daily ed. Nov. 17, 1980) (remarks of Rep. Udall, a sponsor of the bill and chairman of the House Interior Committee through which it passed):

When it came to our committee, I started out with some misgivings. People in my own home State and in the Southwest region felt that there might be precedents set here that would devalue the preference clause rights that some of us have in other areas. . . . The more I thought of it, the more I understood that one of the great strengths of this country is regionalism and local control of matters. . . . I think the thing to do is to give the Northwest area the authority they are seeking in this bill so that they can build an energy future.

tomers that BPA could not have allocated them given existing preference rules and power shortages.⁸²

Second, Congress authorized BPA to sell as "surplus" power in accordance with preference rules only that power not needed to meet its contract obligations, including its obligations to the DSIs.⁸³ Since BPA is obligated to make continuously available to each DSI a specified "amount of power" subject to restriction only for the protection of firm loads, none of the power BPA uses to meet this obligation—whether firm or nonfirm—may be sold as "surplus."

Finally, Congress immunized all statutory power commitments from preference claims by "deeming" BPA to have power sufficient to support the initial mandated contracts.⁸⁴ Through this express legal fiction Congress eliminated the single basis for preference customer challenge: an insufficiency of power to enter into contracts with non-preference customers.⁸⁵ The sole purpose of this provision was to protect the power committed under initial mandated contracts from preference attack—the very type of attack here presented.

⁸²16 U.S.C. § 839c(g)(1) (all customers); 16 U.S.C. §§ 839c(g)(1)(D), 839c(d)(1)(B) (DSIs specifically). See p. 3 *supra*.

⁸³16 U.S.C. § 839c(f). This is the only statutory provision under which preference utilities purchase nonfirm power.

⁸⁴16 U.S.C. § 839c(g)(7).

⁸⁵Once lawfully executed, BPA contracts become "binding in accordance with their terms" notwithstanding preference rules, and BPA is obligated to supply all the power committed thereunder. 16 U.S.C. § 832d(a). See p. 14 *supra*.

2. The Regional Act's Legislative History Confirms that the Challenged Contract Provisions Implement the DSIs' Statutory Power Commitment And are Fully Consistent with Preference Rules

a. Congress Expressly Endorsed the Challenged Contract Provisions

The disputed contract provisions govern DSI power quality by establishing BPA's rights to restrict first quartile power; these provisions are taken directly from the Regional Act and its legislative history.⁸⁶ Section 7(c)—the principal contract provision challenged here⁸⁷—was expressly endorsed by Congress and conforms to the explanation of DSI service provided by BPA to Congress throughout the legislative process. This contract provision contains three elements (identified here by brackets):

[1] Bonneville may restrict deliveries of Industrial Firm Power in amounts up to 25 percent of the Purchaser's Operating Demand, at any time and for any reason in order to protect Bonneville's ability to meet its Firm Obligations. . . .

⁸⁶The Congressional committee reports recognize that each DSI's entitlement has two components, power quantity and power quality. See *Senate Report*, at 28 [Cert. A., at F-56 to F-57] (quantity must be same "amount of power" as in 1975 contracts, whereas "power quality provided the direct-service industries is determined by the reserve obligations set forth in their contracts in order to protect service to firm loads of the Administrator"); see also *House Commerce Report*, at 29, 61-63 [Cert. A., at D-69, D-122 to D-126]. The committee reports also confirm BPA's interpretation that the "amount of power" committed to each DSI under the Regional Act should continue to be measured as a fixed number of kilowatts. See, e.g., *Senate Report*, at 66 [Cert. A., at F-86]; *House Commerce Report*, at 28-29 [Cert. A., at D-68 to D-69]. See also *Chemehuevi Tribe of Indians v. Federal Power Comm'n*, 420 U.S. 395, 409-10 (1975) (Congressional use of phrase with long-standing administrative interpretation presumed to ratify that interpretation).

⁸⁷See n. 79 *supra*; the three other challenged provisions each implement § 7(c).

[2] Such restriction shall not be made for the purpose of selling nonfirm energy [to utilities]. . . .

[3] Bonneville shall not be obligated to plan for or to acquire resources for the purpose of serving the Purchaser's First Quartile load, but Bonneville will treat the Purchaser's First Quartile as a firm load for purposes of resource operation, which firm load shall be subject to the restriction rights provided by this subsection.

[Cert. A., at H-1].

The first element implements the Regional Act's requirement that DSI loads be restricted only to protect BPA's firm loads.⁸⁸ The Committee reports are also express on this point: all BPA rights to restrict DSI power, not just the first quartile restriction rights at issue here, are to be exercised only for the protection of BPA's firm loads and not for any other purpose.⁸⁹ The second element implements the Regional Act's requirement that no power, firm or nonfirm, be sold to any utility, preference or nonpreference, until all of BPA's contract obligations are first met.⁹⁰ The third element carries out Congress's intent—expressed throughout the Regional Act's legislative history—that BPA serve the DSIs' first quartile primarily with nonfirm power but treat that service as "firm" in order to provide DSI loads with the average power availability necessary to effectuate the Regional Act's rate provisions.⁹¹

⁸⁸16 U.S.C. §§ 839c(d)(1)(A), 839a(17). See pp. 17, 25-26 *supra*.

⁸⁹*House Interior Report*, at 48 [Cert. A., at E-106 to E-107]; *House Commerce Report*, at 61-63 [Cert. A., at D-122 to D-126]; *Senate Report*, at 23. ("It is not intended that the Administrator's [rights to restrict DSI power] will be used to protect other than firm loads."), 28 [Cert. A., at F-48, F-56].

⁹⁰16 U.S.C. § 839c(f). See *House Commerce Report*, at 63 [Cert. A., at D-126] ("Section 5(f) provides that power that is *not needed* to meet BPA's obligations under subsections (b), (c), and (d) is to be sold in accordance with this Act and existing law.") (emphasis added). See also p. 27 *supra*.

⁹¹See pp. 30-34 and 47 n. 120 *infra*.

The text of Section 7(c) is taken directly from the *House Interior Report*, at 48 [Cert. A., at E-106 to E-107] (emphasis added):

Sales to existing DSIs are required under this subsection to continue to provide a portion of BPA's power system reserves. *The Committee understands and intends that . . . [a]pproximately 25 percent of the DSI load [the first quartile] is to be treated as a firm load for purposes of resource operation and will provide an operating reserve that may be restricted by BPA at any time in order to protect the Administrator's firm loads within the region and for any reason, including low or critical streamflow conditions and unanticipated growth of regional firm loads.* An additional 25 percent of the DSI load [the second quartile] will be treated as a firm load for both planning and operating purposes and will provide a planning reserve to protect the Administrator's firm loads against the delayed completion or unexpectedly poor performance of regional generating resources or conservation measures implemented or acquired by BPA.

This report language repeats *verbatim* and expressly endorses the interpretation of Regional Act requirements for DSI service provided by BPA at the Interior Committee's request.⁹² This language was expressly affirmed as representing the Senate's intent as well,⁹³ and corresponds

⁹²See Kazen Letter, Appendix III, VIII COR 2350 [Cert. A., at I-23]. The Ninth Circuit overlooked the committee's statement that it "understands and intends" this service in finding BPA's interpretation not to have been ratified by Congress. 686 F.2d 715.

⁹³126 CONG. REC. S14,690-91 and S14,698 (daily ed. Nov. 19, 1980) (remarks of Sens. Jackson and McClure) [Cert. A., at J-1 to J-2]. Sens. Jackson and McClure were the chairman and ranking minority member of the Senate committee that acted on the bill, and each was also an original sponsor.

to the first quartile restriction rights described in the other committee reports.⁹⁴

The legislative history thus demonstrates that Congress was informed of, understood, and intended BPA's plan to serve the first quartile (a) without interruption other than to protect BPA's firm loads, and (b) with power—both firm and nonfirm—that could be produced on BPA's existing system if that system were operated to treat the first quartile as a firm load. BPA would assure first quartile service to the extent its system could be operated to produce the necessary power, including nonfirm power.

The increased power production, sales, and revenues made possible by such service were efficiencies recognized as deriving solely from BPA's ability to mesh river operations with the interruptibility feature of DSI loads, and were relied upon throughout the legislative process to effectuate the Regional Act's complicated rate provisions. Thus, DSI service received extended treatment in BPA's successive analyses of the legislation's rate provisions, prepared for Congress and BPA's customers. The first of these analyses was written shortly after the legislation was first introduced in August 1978.⁹⁵

The greatest opportunity for a change in the prospective industrial firm sales is in operations affecting the predictable supply to the DSI load and in a corresponding increase in the reserves they provide. By treating the entire DSI load as a firm load, subject to interruption in favor of other firm loads in the region, the DSIs will receive service which is closer to full service under many more operating conditions than

⁹⁴*House Commerce Report*, at 52, 61-2 [Cert. A., at D-107, D-122 to D-124]; *Senate Report*, at 23, 28, 59 [Cert. A., at F-47 to F-48, F-56 to F-57, F-74].

⁹⁵The bill (S.885) that became the Act in the 96th Congress was first introduced in the 95th Congress. See 125 CONG. REC. S3997 (daily ed. April 5, 1979) (remarks of Sen. Jackson).

they do at present. The DSI load is uniquely able to be considered in this fashion because they can borrow on the expectation of better than critical streamflows or resource production, yet stand ready to curtail their loads beyond the normal reserve requirement in order to protect continued service to regional firm loads. The expected increase in industrial firm supply on a long-term average is from a present 75% industrial firm with 14% additional nonfirm sales to nearly 96% industrial firm service.⁹⁶

A year later, the Senate committee report incorporated BPA's final analysis of rate directives:

3. Direct-Service Industry

a. *Rate Availability.* This rate applies to all "Industrial Firm" sales to BPA's direct-service industries which provide planning and operating reserves. The quantity of [DSI] power for rate purposes is based on the proportion of the total industrial requirement, on a long-term average (currently estimated to be between 85 percent and 96 percent of the total DSI load), that BPA projects it will be able to serve directly. This projected availability is predicated on the continued planning and development of "firm" resources under critical stream-flow conditions to carry 75 percent of the total DSI requirements. The balance would be served with resources which are in excess of critical planning amounts [nonfirm and "borrowed" firm power] but operated to meet the entire DSI load as if it were firm.⁹⁷

⁹⁶Memorandum regarding "BPA Obligations With Respect To DSI Top Quartile," (Feb. 12, 1981), XXV COR 6750 [Cert. A., at K-3] (excerpting 1978 and 1979 "Analysis of Rate Directives").

⁹⁷*Senate Report*, at 59 [Cert. A., at F-74].

These passages demonstrate that BPA consistently⁹⁸ represented to Congress its intention to treat the DSI first quartile as a firm load for operating purposes subject to interruption only for the protection of firm loads,⁹⁹ and

⁹⁸BPA's contemporaneous construction remained consistent after passage of the Regional Act. See, e.g., DSI-BPA Meeting, Remarks of Earl Gjelde, Dec. 11, 1980, 1 COR 254-62 (BPA's interpretation of Act's requirements for first quartile service six days after the Act became law). In its first rate decision under the Regional Act, published several months before the contracts at issue here were offered and accepted, BPA also adhered to this plan for DSI service:

6. *Firmness of Top Quartile*

Service to the DSI's [sic] under the Regional Act is for power subject to limited interruption for service to the Administrator's other firm loads. As part of this service BPA is to plan and acquire sufficient firm resources to satisfy three quarters of the DSI load. The remaining one quarter is commonly referred to as the DSI "Top Quartile." This top quartile is to be treated as a firm load for operating purposes only. . . .

. . . .

The Regional Act establishes the quasi-firm status of the DSI top quartile. Sales to the DSI's [sic] by virtue of Section 5(d)(1)(A) are to "provide a portion of the Administrator's reserves for firm power loads." The Regional Act defines reserves as the electric power needed to avert particular planning or operating shortages for the benefit of firm power customers. Service to the top quartile cannot be restricted to provide service to nonfirm loads or to make sales of nonfirm energy. I view the top quartile as providing a reserve for the Administrator's firm load obligations. Therefore, I have determined that the proposed utilization of energy above critical streamflows to serve the top quartile before marketing as nonfirm does not violate any preference or priority provisions awarded the public bodies and cooperatives, but rather is service mandated by the Regional Act and its legislative history. . . .

BPA, *Administrator's Record of Decision, 1981 Wholesale Power Rate Proposal IV-14 to IV-16* (June 1981).

⁹⁹Section 7(d) ("Second Quartile Restriction Rights") of the new DSI contracts reduces the quality of DSI second quartile power by increasing the number of circumstances in which second quartile

that Congress expressly adopted this plan to assure the DSIs an increased average power availability (96%) that would effectuate the Regional Act's rate provisions.¹⁰⁰

b. Congress Did Not Intend Preference Rules to Affect the DSIs' Statutory Power Commitment

Congress was aware that absent the Regional Act, all BPA power would have been allocated administratively in accordance with preference.¹⁰¹ This was precisely the problem Congress sought to cure.¹⁰² Congress required initial contracts for BPA's nonpreference customers, thereby creating statutory entitlements to power for those customers. Having committed power by statute to nonpreference customers under initial mandated contracts and having preserved preference to govern BPA's allocation of uncommitted power, Congress saw "no inconsistency between the provisions and intent of this Act and the

power can be interrupted. See Respondents' Memorandum in Opposition to Motion for Temporary Injunction or Stay Pending Review, filed Sept. 9, 1981, page 20 [Table II] [JA 21]; Affidavit of Bruce E. Mizer at 7-8, dated Sept. 8, 1981, filed with Reply Memorandum of Direct Service Industries; § 7(d) of 1981 contracts [Cert. A., at H-1 to H-9]. These new second quartile restriction rights are also taken from the House Interior Committee's report language set forth above.

Given lower power quality for the second quartile the Regional Act's treatment of the first quartile as a firm load subject to interruption only for protection of BPA's other firm loads was particularly important to the DSIs in accepting new contracts. See *Pacific Northwest Electric Power Issues: Hearings Before Subcomm. on Energy and Power of the Comm. on Interstate and Foreign Commerce, House of Representatives, on H.R. 13931, 95th Cong., 2d Sess. 1022-1035 (1978)* (statement of Jack Speer, Anaconda Company) [Cert. A., at 0-4]; Mizer Affidavit, *supra*, at 7-8.

¹⁰⁰See p. 47 *infra*.

¹⁰¹ See, e.g., *House Commerce Report*, at 27-28, 36-37 [Cert. A., at D-66 to D-67, D-80 to D-82].

¹⁰²See pp. 4-5 *supra*.

existing preference clause of the Bonneville Project Act This Act and the preference clause are expected to operate in a mutually compatible manner."¹⁰³

The Regional Act's legislative history emphasizes that Congress did not reaffirm preference only to abort the non-preference customer power commitments made possible by the Regional Act.¹⁰⁴ To preclude any such result, Congress added a provision "deeming" BPA to have sufficient power to support the initial mandated contracts at the same time that it reaffirmed preference.¹⁰⁵ Congress's purpose in enacting this legal fiction was made clear: it was "intended to

¹⁰³*Senate Report*, at 26 [Cert. A., at F-53]. Because preserving preference is consistent with committing power by statute to non-preference customers, *see* p. 41 *infra*, Congress could and did describe both as virtues of the Regional Act. *See, e.g., House Commerce Report* at 33-35 [Cert. A., at D-76 to D-78] (preference); *id.* at 27-28 [Cert. A., at D-66 to D-68] (required contracts for non-preference customers); 125 CONG. REC. S3998 (daily ed. Apr. 5, 1979) (remarks of Sen. Jackson) (introducing the bill, promising amendments to protect preference, and explaining that the legislation will "eliminate the need" for BPA allocation by permitting BPA to contract with nonpreference customers).

¹⁰⁴The Regional Act protects preference utilities by limiting BPA's authority to restrict its firm power sales obligations to them, 16 U.S.C. §§ 839c(b)(6), 839c(g)(6), and through a special firm power rate "ceiling", 16 U.S.C. §§ 839e(b)(2), 839e(b)(3). *See House Commerce Report*, at 33-34 [Cert. A., at D-76 to D-77]; *House Interior Report*, at 33-34 [Cert. A., at E-80 to E-82]; *see also* 125 CONG. REC. S3999 (daily ed. Apr. 5, 1979) (remarks of Sen. Jackson). *See generally, Mellem, supra*, n. 13, at 276-78. Reaffirmation of preference was intended to protect preference utility "contract requirements" by assuring these utilities priority to contract renewals after expiration of the initial contracts if BPA lacked sufficient power for all customers. *See House Commerce Report*, at 34 [Cert. A., at D-77]; *House Interior Report*, at 34 [Cert. A., at E-82]. The "contract requirements" of preference utilities do not include nonfirm power, but rather power for each utility's net "firm power load." 16 U.S.C. § 839c(b)(1).

¹⁰⁵16 U.S.C. § 839c(g)(7). *See* p. 16 *supra*.

ensure that a challenge [on preference grounds] to the initial contracts required to be offered under this Act *will not be sustained.*" *House Commerce Report*, at 64 (emphasis added) [Cert. A., at D-126 to D-127]. As stated by Rep. Foley, a leading sponsor:

It is said that this bill will not prevent litigation. That is certainly true. . . . [T]he key point is that litigation under this bill will not include litigation to determine the validity of each entity's new power supply contract.

On the contrary, by stating that BPA shall be "deemed" to have sufficient power to enter into all the 20-year power sales contracts mandated by the legislation, the bill specifically ensures that these new contracts will be valid against legal challenge. This provision does not "guarantee" actual power deliveries in day-to-day operation, but it does guarantee that whatever litigation occurs on power matters will not be litigation going to the heart of any BPA customer's power sales contract and power allocation—the most important single result of this legislation.

126 CONG. REC. H10,678 (daily ed. Nov. 17, 1980) [Cert. A., at L-2].¹⁰⁶

¹⁰⁶BPA stated in offering the contracts here at issue:

This contract is the initial contract that Bonneville is required to offer each Industrial Purchaser pursuant to sections 5(d)(1)(B) and 5(g) of the Regional Act. As you know, the Act contemplates in section 5(d)(1)(A) additional, future contracts with each existing Industrial Purchaser, but unlike this initial contract, such future contracts do not have the benefit of the statutorily deemed sufficiency of power available to the Administrator under section 5(g)(7). Bonneville's ability to offer any future contracts to its nonpreference customers, including the Industrial Purchasers, is therefore largely dependent upon Bonneville achieving firm load/resource balance while these initial contracts are in effect.

Cover Letter by BPA Administrator Offering New DSI Contract (Aug. 27, 1981) [Cert. A., at M-1 to M-2].

3. The Ninth Circuit Misconceived the DSIs' Statutory Power Commitment and the Role of Preference Rules under the Regional Act

a. The Opinion Fails to Examine the DSIs' Power Commitment and Incorrectly Assumes the Disputed Power is Subject to Allocation by BPA

The Regional Act commits to the DSIs a specified amount of power, subject to restriction for the protection of BPA's firm loads. This statutory commitment has both a power quantity and power quality component, and is expressly immunized from preference challenge.¹⁰⁷ In declaring "unreasonable" BPA's interpretation of the statutory provisions establishing this commitment, the Ninth Circuit first failed to treat—and then entirely misconstrued—the provisions upon which that interpretation was based. As a result, the Opinion never adequately addresses the fundamental legal issue: whether Congress statutorily committed the disputed power to the DSIs, and thereby immunized this power from preference claims.

In its original Opinion, the Ninth Circuit acknowledged that the Regional Act limits to the protection of BPA's firm loads the purposes for which DSI power may be restricted, but concluded that the disputed contract provisions violate preference because the power at issue could never have been "allocated" to the DSIs in the first instance, given preference customer demand. The Ninth Circuit stated:

No customer has an expectation of receiving any non-firm power until BPA allocates it.

686 F.2d at 712.

This is an assumption, not a determination; it is flatly wrong and begs the relevant question. Nonfirm power committed to customers by statute is not subject to administrative allocation. The nonfirm power here in dispute is

¹⁰⁷See pp. 23-26, 28-36 *supra*.

used by BPA in meeting its obligations to the DSIs under initial contracts mandated by the Regional Act. Thus, this power has been statutorily committed and is not subject to administrative allocation.

BPA's use of nonfirm power to serve a portion of the DSIs' load achieves the operating and revenue benefits intended by Congress, but neither diminishes the DSIs' "amount of power" nor enlarges BPA's restriction rights under the Regional Act.¹⁰⁸ The Ninth Circuit's original Opinion fails even to cite the Regional Act's "amount of power" provision—the power quantity component of the DSIs' commitment¹⁰⁹—and thus that Opinion never determines what power is statutorily committed to the DSIs; it simply assumes that the disputed power is uncommitted power subject to administrative allocation. *Id.* at 712, 715. Confronted in the petitions for rehearing with this significant omission, the Ninth Circuit modified its original Opinion by noting:

Section 5(d)(1)(B) expressly links the DSIs' present allocation to their entitlement under the 1975 contracts.

¹⁰⁸16 U.S.C. § 839c(d)(1)(B). In fact, the first use of nonfirm power is to meet BPA's contract obligations, EIS, *supra* n. 12, at IV-71, and no BPA power—firm or nonfirm—is available for sale as surplus in accordance with preference rules until all of BPA's contract obligations have been met. 16 U.S.C. § 839c(f). Conceptually, to commit nonfirm power by contract is no different from committing firm power by contract: both such commitments are made in advance of actual power production and depend on unpredictable streamflow levels. Indeed, the production of firm power is further contingent on the actual operation of non-hydro resources such as coal and nuclear plants. The nonpreference customer contracts at issue in *Volunteer*, 139 F. Supp. at 26, *Municipal Electric Utils. Ass'n v. Power Auth. of New York*, Docket No. EL78-24-001, Opinion No. 151, 21 FERC ¶ 61,021 (1982), and *Arkansas Power & Light Co. v. Schlesinger*, No. 79-1263 (D.D.C. 1980) (copy of Opinion lodged with this Court), each committed nonfirm power to the purchaser in advance of production.

¹⁰⁹16 U.S.C. § 839c(d)(1)(B). See pp. 24-26 *supra*.

It is undisputed that under the 1975 contracts the DSIs received nonfirm power only after the preference customers filled their nonfirm needs.

686 F.2d 708, 712 n.4.

Both assertions are incorrect, and reflect the Ninth Circuit's confusion regarding the DSIs' statutory commitment. Section 5(d)(1)(B) does not link the DSIs' new "allocation" to their "entitlement" under the 1975 contracts; rather, it links only the "amount of power"—the DSIs' power quantity—provided under the two contracts. The power quality component of the DSIs' commitment is determined by BPA's rights to restrict this power, and in the Regional Act is changed by Section 5(d)(1)(A). Under the 1975 contracts preference utilities obtained the first quartile power here in dispute only through BPA's exercise of contract rights to restrict this power "at any time." Under Section 5(d)(1)(A) of the Regional Act, BPA now is permitted to restrict first quartile power only for the protection of its firm loads, and not for the purpose of making nonfirm power available to utilities. Because the Ninth Circuit failed to understand that it was only through the exercise of BPA's restriction rights that preference utilities secured this power under the 1975 contracts, the court failed to recognize that by limiting BPA's restriction rights Congress has now committed this power to the DSIs.¹¹⁰

Thus, the Court's conclusion that "nonfirm power is no less subject to the preference than firm power," 686 F.2d

¹¹⁰See pp. 23, 34 *supra*. The original Opinion also failed to treat the "deemed" sufficiency provision. In the September 7 modification the Court stated that this provision "does not grant the DSIs any greater entitlement than what they received under the 1975 contracts." 686 F.2d at 712 n.4. This only further demonstrates the Ninth Circuit's confusion regarding the DSIs' statutory commitment; by "deeming" the initial mandated contracts to be supported with a sufficiency of power, Congress was concerned with protecting—not creating—statutory power commitments.

at 712, is wholly irrelevant. Preference rules govern BPA's allocation of *all* power—firm and nonfirm—that has not been committed by Congress. By failing properly to examine the provisions of the Regional Act upon which the DSIs' commitment is based, the Court assumed that the nonfirm power here disputed is available for administrative allocation in accordance with preference.¹¹¹

¹¹¹The Ninth Circuit rejected as "ambiguous" the Senate Report language that supports BPA's interpretation of Regional Act requirements for DSI service:

[T]he reference to "treating the DSI load as firm in the operation" [sic] is ambiguous because the first quartile cannot be treated as firm entirely. Unlike firm power, it is interruptible and subject to priorities.

686 F.2d at 713 n.6.

Had the Ninth Circuit better understood BPA's hydro system and the design for DSI service mandated in the Regional Act, it would have understood that the referenced language—which recurs throughout the legislative history—is entirely unambiguous. BPA will operate its system in the manner most likely to produce sufficient power, including nonfirm power, to serve the DSIs' first quartile. Indeed, the Senate Report's reference to resources "in excess of critical planing amounts" by definition assumes service with nonfirm power. To treat the first quartile as "firm for purposes of resource operation" means that BPA need not plan firm resources for such service, because unlike the remainder of the DSI load the first quartile is not "a firm load for *both* planning and operation purposes." *House Interior Report*, at 48 [Cert. A., at E-106 to E-107] (emphasis added). The fact that the first quartile is "interruptible" does not prevent its treatment as "firm" for purposes of resource operation; the remainder of the DSI load is "firm" for both operating *and* planning purposes but is "interruptible" under specific circumstances to protect BPA's firm service to its utility customers. *See, e.g., id.*

b. Preference Does Not Affect Power Committed by Statute and Congress Need Not Declare an "Explicit Exception" to Preference in Committing Power to Nonpreference Customers

Although the Regional Act assures power for nonpreference customers through an integrated program of statutory commitments, the Ninth Circuit refused to recognize the DSIs' power commitment absent an "explicit exception" to preference, 686 F.2d at 709, and concluded that "the purposes of the Act and its preference clause are best served by an interpretation that ensures the sale of power to preference customers." *Id.* at 715. The Opinion indicates a fundamental misconception regarding the function of preference rules. Preference is simply a statutory mechanism used to govern the administrative allocation of uncommitted power during periods of insufficiency; it constrains an agency's—but not Congress's—disposition of power. By requiring Congress to fashion an "explicit exception" to preference in order to commit power to nonpreference customers, the Opinion improperly burdens Congress's plenary authority to dispose of federal property and elevates preference to quasi-Constitutional status.

The list of power marketing laws in which Congress has included preference rules while directing that power be supplied to nonpreference customers is long. None of these laws contains an "explicit exception" to preference¹¹² and

¹¹²In addition to the Boulder Canyon Project Act, 43 U.S.C. §§ 617-618, and the Tennessee Valley Authority Act, 16 U.S.C. §§ 831-831dd, discussed in text, *infra*, none of the following power marketing laws contains an "explicit exception" to preference:

a. The "Regional Preference Act" of 1964 (also known as Pub. L. No. 88-552), 16 U.S.C. §§ 837-837h, requires BPA to sell hydro power to Northwest customers including nonpreference customers before selling it to Southwest preference customers. *See also* 16 U.S.C. § 839f(c) (extended to all power).

b. The Hungry Horse Dam Act of 1944, 43 U.S.C. § 593a, requires sale of project power to Montana customers including nonpreference customers before sale to preference customers

no such exception is necessary because preference rules simply do not affect power that has been lawfully committed. Indeed, the very reason Congress commits power to particular customers by statute is that it intends a distribution of federal power that could not be achieved by preference rules alone; allocation of power by preference is the perceived problem, not the intended solution.

No court has previously required that Congress provide an "explicit exception" to preference in order to assure the sale of power to nonpreference customers. For example, without creating an "explicit exception" to the preference clause contained in Section 5(c) of the Boulder Canyon Project Act, 43 U.S.C. § 617(c), Congress in Section 5(b) of that Act, 43 U.S.C. § 617(b), required that contract renewals be granted to all initially contracting utilities, preference and nonpreference alike. When two nonpreference utilities were denied contract renewals and the power was sold instead to other utilities, including preference utilities, the court held that the nonpreference

in other states. Congress has reaffirmed and extended this requirement. 16 U.S.C. § 837h; 16 U.S.C. § 839g(f).

c. The Atomic Energy Commission Act of 1954, 42 U.S.C. § 2064, requires that preference be given to "privately owned utilities" providing service to rural areas as well as to public bodies and cooperatives.

d. The Niagara Redevelopment Act of 1957, 16 U.S.C. §§ 836-836a, divides all power equally between preference and nonpreference customers, and commits 445,000 kilowatts of the nonpreference power to a particular private utility for resale to specific electroprocess industries. 16 U.S.C. § 836(b) (3). See *Municipal Electric*, 21 FERC at ¶¶ 61,109, 61,128.

e. The Atomic Energy Commission Appropriations Act, Pub. L. No. 87-701, § 112(e), 76 Stat. 604 (1962), [Cert. A., at Q] requires that power from steam at the Hanford Reactor be divided equally between public and private buyers.

utilities' "statutory rights" had been violated. *Citizens Utilities*, 149 F.Supp. at 160-63.¹¹³

More strikingly, the court in *Volunteer*, 139 F.Supp. at 22, upheld against preference challenge the sale of power to a nonpreference industrial customer under the Tennessee Valley Authority Act ("TVA Act"), 16 U.S.C. §§ 831-831dd—a statute that contains no "explicit exception" to its preference provisions. In *Volunteer* a preference utility challenged TVA's sale of power to a nonpreference industrial customer, arguing that the TVA Act's preference clause (16 U.S.C. §§ 831i-831k) compelled TVA to allocate this power to plaintiff, who would then resell it to the same industry at retail rates. To determine Congress's intended distribution of power the court examined the TVA Act's structure and history, rather than focusing exclusively on preference rules:

Granted the Act states preference shall be given to states, counties, municipalities, and cooperatives not organized for profit. However, the Act does not end there.

Volunteer, 139 F. Supp. at 26.

The court then noted that the TVA Act expressly contemplates direct sales to industries in order to assure high load factors, increased revenues, and reduced costs for consumers, and concluded in language applicable here:

The provisions cited are not conflicting so as to vitiate the effectiveness of one as opposed to the other. In fact

¹¹³Moreover, the nonpreference utilities ultimately were granted power from a different project, which also was subject to preference rules. See *Fort Mojave Indian Tribe v. United States*, No. 77-4790ALS, slip op. at 2-5 (C.D. Cal. 1978) (copy of Opinion lodged with this Court).

they are in complete harmony. The policy voiced by the statute empowering defendant to sell direct to industry and pass on to members of the preferred classes the benefits derived thereby are [sic] salutary and in furtherance of the avowed intent of the preceding section. . . . The position sought by plaintiff would actually circumvent the true intent of Congress that the cost of power to domestic and rural users be kept at the lowest possible rates. Instead, the result would be the enrichment of a small class of distributors such as plaintiff.

Id.

This analysis stands in sharp contrast to the Ninth Circuit's view that Congress can effect sales to nonpreference customers only through "explicit exceptions" to preference. Both the Regional Act and the TVA Act provide for the sale of power to nonpreference industrial customers; indeed, the Regional Act mandates the sale of power to industries whereas the TVA Act merely authorizes such sales as a "secondary purpose." 16 U.S.C. § 831j. Neither Act "ends" with its preference clause. The Ninth Circuit's attempts to distinguish *Volunteer* are completely unavailing.¹¹⁴

¹¹⁴See 686 F.2d at 715, n.9. The Ninth Circuit mistakenly relied upon its prior decision in *City of Santa Clara v. Andrus*, 572 F.2d 660 (9th Cir. 1978), *cert. denied*, 439 U.S. 859 (1978). That case arose under the Reclamation Project Act of 1939, 43 U.S.C. § 485h, a statute in which Congress made no provision for the sale of power to nonpreference customers but rather left all power to be allocated administratively in accordance with preference rules. Thus, *Santa Clara* cannot "contradict" *Volunteer*, and is wholly irrelevant in construing statutes such as the Regional Act that indisputably commit power to many types of nonpreference customers.

4. The Ninth Circuit's Misapplication of the Standard of Review has Impaired BPA's Ability to Obtain the Benefits of DSI Service Intended by Congress

The well-established standard of review applicable here is whether BPA reasonably interpreted the Regional Act.¹¹⁴⁸ While purporting to apply this standard, the Ninth Circuit *sub silentio* subjected BPA's interpretation to heightened scrutiny by rejecting the explanation of technical statutory provisions for which there was acknowledged support in the legislative history and requiring that BPA's interpretation be supported by an "explicit exception" to preference. 686 F.2d at 709. Rather than demanding an "interpretation [of the Regional Act] that ensures the

¹¹⁴⁸See, e.g., *American Paper*, 51 U.S.L.W. at 4552; *Federal Election Comm'n*, 454 U.S. at 39;

[T]he task for the Court of Appeals was not to interpret the statute as it thought best but rather the narrower inquiry into whether the [agency's] construction was "sufficiently reasonable" to be accepted by a reviewing court. *Train v. Natural Resources Defense Council*, 421 U.S. 60, 75 (1975); *Zenith Radio Corp. v. United States*, 437 U.S. 443, 450 (1978). To satisfy this standard it is not necessary for a court to find that the agency's construction was the only reasonable one or even the reading the court would have reached if the question initially had arisen in a judicial proceeding. *Ibid.*; *Udall v. Tallman*, 380 U.S., at 16; *Unemployment Compensation Comm'n v. Aragon*, 329 U.S. 143, 153 (1946).

An agency's interpretation of its own enabling statute is entitled to special deference, see, e.g., *CBS*, 453 U.S. at 382; *United States v. Rutherford*, 442 U.S. 544, 553 (1979), *cert. denied*, 449 U.S. 937 (1980), particularly when the law is new and the agency was directly involved in its development, see, e.g., *United States v. Vogel Fertilizer Co.*, 455 U.S. 16, 31 (1982); *Howe v. Smith*, 452 U.S. 473, 485 (1981); *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 566 (1980); *Zenith Radio Corp. v. United States*, 437 U.S. 443, 450 (1978); *Zuber v. Allen*, 396 U.S. 168, 192 (1969); *Udall v. Tallman*, 380 U.S. 1, 16 (1965); *Power Reactor Development Co. v. Int'l Union of Electrical, Radio and Machine Workers*, 367 U.S. 396, 408 (1961).

sale of power to preference customers," *id.*, at 715, the Ninth Circuit should have inquired whether BPA reasonably interpreted the Regional Act to ensure the sale of power as Congress intended.

The deference normally accorded agencies in interpreting statutes they administer is particularly warranted here. For four years, BPA assisted Congress in drafting and interpreting the Regional Act, consulting on its numerous technical provisions, and preparing for contract offers subsequent to passage. This extraordinary contribution to a highly technical and complex statute was expressly acknowledged by Congress.¹¹⁵ The contract provisions challenged here are designed to assist the optimum operation of BPA's hydro system, a matter in which BPA is the undisputed expert, and were taken directly from the Regional Act and Congressional committee reports. BPA supplied the text of these provisions to Congress during the legislative process, remained consistent in its interpretation of their meaning, and implemented them precisely as it had previously described.¹¹⁶

Congress and BPA spent years designing DSI service under the Regional Act to capitalize on unique features of the DSI loads and BPA's hydro system, and thereby to achieve specific operating efficiencies and increased revenues.¹¹⁷ Under the Opinion, BPA will be forced to sell to a small sub-class of preference utilities power it had planned to use for DSI service, thereby jeopardizing

¹¹⁵See, e.g., 125 CONG. REC. S11,592 (daily ed. Aug. 3, 1979) (remarks of Sen. Hatfield) [Cert. A., at C], 126 CONG. REC. H9848-49 (daily ed. Sept. 29, 1980) (remarks of Rep. Dingell) [Cert. A., at G-1 to G-2].

¹¹⁶See pp. 28-36 *supra*.

¹¹⁷See *id.* and pp. 7-13 *supra*; see also X COR 2695 [JA 101].

its ability to secure these benefits. The utilities will use this power to increase their sales to other utilities,¹¹⁸ depriving BPA of the extra revenue it had anticipated receiving from the DSIs. The loss of this revenue directly impairs BPA's ability to effectuate one of the Regional Act's primary purposes: rate subsidies for residential and farm consumers of nonpreference utilities.¹¹⁹ The Regional Act's complex and interconnected rate provisions depend upon BPA's ability to provide the DSIs' first quartile with a high average availability of power—the very level of service that the Ninth Circuit's Opinion denies. If the Opinion is allowed to stand, the Regional Act's rate provisions will not work and cannot achieve the purposes Congress intended.¹²⁰

¹¹⁸ Respondents argued below that they may need BPA nonfirm power to prevent shortages if their own power plants fail to operate as planned. The Court should not be misled. BPA has never provided nor been obligated to provide "back-up" or reserve power for utility-owned resources except under the Pacific Northwest Coordination Agreement, which is not affected by the contract provisions challenged here. See *Mizer Affidavit*, *supra* n. 99, at 11-13. The Coordination Agreement defines the rights and obligations of all Northwest generating utilities, BPA, and other parties. That Agreement and the Regional Act obligate Respondents to maintain their own reserves for their own resources. *Id.*; 16 U.S.C. § 839c (b)(1). Respondents would be in breach of the Agreement if they failed to provide such reserves and relied instead on nonfirm power from BPA for protection. *Mizer Affidavit*, *supra* n. 99, at 12; Coordination Agreement §§ 8 and 12, XXIII COR 6224-26, 6241. See also DEIS, *supra* n. 4, at 11-71 [Cert. A., at P] (as members of Northwest Power Pool, Respondents must maintain their own reserves for their own power plants).

¹¹⁹ In the first year of the Regional Act, residential and farm consumers of nonpreference utilities received more than \$216,000,000 in direct rate relief, almost all of it paid by the DSIs. BPA, 1982 *Annual Report*, at 1.

¹²⁰ The Regional Act establishes a complex interrelationship between service to the DSI first quartile, the residential exchange program, and the rate directives through which BPA recovers the costs of that program. After July 1, 1985 the DSI rate will essen-

The Opinion also jeopardizes continued DSI operations in the Northwest. DSI rates have increased more than 700% since 1979, eliminating the original cost advantages of Northwest aluminum production. Now, under the Opinion, the DSIs also face significant power interruptions in excess of those authorized by the Regional Act—an unfavorable and costly quality of service compared with that available in other regions of the United States and abroad. As a result, continuation of the DSIs' Northwest operations may become uneconomical, forcing plant closures and triggering significant losses for BPA, the DSIs, and the regional economy.¹²¹

The immediate effect of the Ninth Circuit's decision will be to allow a small group of preference utilities which op-

tially equal BPA's firm power rate to preference customers, plus a typical utility markup above resource costs, minus adjustments for the lower cost of serving this size and type of load and a credit for the value of DSI reserves. 16 U.S.C. § 839e(c)(2). This will allow BPA to pay a substantial portion of the additional costs of the exchange program through the "profit" gained by charging the high DSI rate for first quartile service while serving the first quartile with relatively low cost nonfirm and "borrowed" firm power. Any decline in service to the DSI first quartile reduces BPA's ability to secure this added revenue. Loss of this revenue could destroy one of the Regional Act's primary goals—wholesale rate parity for residential and farm consumers served by preference and nonpreference utilities—by triggering the preference customer "rate ceiling." 16 U.S.C. §§ 839e(b)(2), 839e(b)(3) (first sentence). The Ninth Circuit's Opinion upsets these complex and interdependent provisions by "interrupt[ing] the flow of non-firm power to the DSIs." 686 F.2d at 712. *See also Senate Report*, at Appendix B [Cert. A., at F-74]; *Kazen Letter*, VIII COR 2335, [Cert. A., at I-2 to I-3].

¹²¹*See, e.g., EIS, supra* n. 4, at IV-340 to IV-341, IV-355. Unless reversed, the Opinion will have an increasingly disruptive impact on the DSIs over time as preference utilities develop more displaceable generating resources and a greater demand for BPA nonfirm power. This long-term impact is of major concern to DSIs now deciding where to concentrate future investment and production. *See, generally, Mizer Affidavit, supra* n. 99, at 25.

erate generating resources to substitute federal power—otherwise committed to the DSIs—for power they themselves produce and are statutorily obligated to use in supplying their own consumers. These few utilities in turn will sell their own power—now “displaced” with the DSIs’ non-firm power—at higher prices to entities other than their own retail consumers.¹²² Congress understood the windfall that would accrue if utilities were allowed to divert and arbitrage DSI power, and consequently permitted interruption of DSI service only when necessary to protect firm loads from shortages of BPA power. The Opinion now makes possible under the Regional Act precisely what was prohibited by the Sixth Circuit under the TVA Act: the enrichment of a small group of preference utilities at the expense of all other regional power users. *See Volunteer*, 139 F. Supp. 22.

¹²²*See, e.g., id.* at 11-13; Witness Statement of Donald E. Long at 4-5, filed Sept. 10, 1981. Although all BPA preference utilities are represented by Respondent-Intervenor Public Power Council, only those few utilities with their own generators are able to exploit the power diverted from DSI loads because they alone produce power capable of being “displaced” and resold. The Ninth Circuit’s failure to appreciate displacement—and the potential for windfall gain made possible thereby—leads to its incorrect conclusion that “[h]ere, the preference customers want the low-cost power for their customers.” 686 F.2d at 715 n.9.

CONCLUSION

For these reasons the judgment of the Ninth Circuit should be reversed, and remanded with instructions to enter a new judgment confirming the administrative action challenged below and the lawfulness of the disputed DSI contracts.¹²³

Dated: July 11, 1983

Respectfully submitted,

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¹²³Respondents raised two other arguments below: that BPA's change in DSI restriction rights unlawfully increased the "amount of power" to which each DSI is entitled under the Regional Act, and that this change was made without proper observance of BPA's pre-Regional Act public involvement procedures for administrative changes in power marketing policies. Both issues are frivolous. See pp. 17, 24-26 *supra* (basis for BPA's interpretation that statutory phrase "amount of power" has same meaning as in 1975 contracts, not new meaning Respondents desire); see also nn. 51, 52 *supra* (BPA adopted and followed new post-Regional Act procedures for contract negotiations which Respondents took part in and did not challenge). In any event, neither argument can survive this Court's disposition of the principal issue: the reasonableness of BPA's interpretation that the challenged contract provisions are required by provisions of the Regional Act committing this power to the DSIs.

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CLERK, U. S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
DEPUTY

ENTERED

CLERK, U. S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
DEPUTY

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

THE FORT MOJAVE INDIAN TRIBE, the
CITY OF NEEDLES, California, a
municipal corporation, the NEEDLES
UNIFIED SCHOOL DISTRICT, and the
NEEDLES-DESERT COMMUNITY HOSPITAL
DISTRICT,

Plaintiffs,

v.

THE UNITED STATES OF AMERICA, the
SECRETARY OF THE INTERIOR, the
SECRETARY OF ENERGY, and the
BUREAU OF RECLAMATION,

Defendants.

CV 77-4790ALS

ORDER GRANTING
DEFENDANTS' MOTION
FOR SUMMARY JUDGMENT

This action came on regularly for hearing on March 20,
1978, pursuant to plaintiffs' motion for a preliminary
injunction and defendants' motion to dismiss or, alternatively,
for summary judgment. The court heard oral argument,
received the sworn testimony of certain witnesses, and
accepted several affidavits. On March 28, 1978, the court
denied plaintiffs' motion for a preliminary injunction by

Docketed
MJC-c 25- PVS
MJC Notice 175
JS-6 26

JUL 11 1978

23

1 Minute Order. The court's Findings of Fact and Conclusions
2 of Law were filed on April 7, 1978, and are incorporated
3 herein by this reference.

4 Having considered the pleadings, briefs, affidavits and
5 exhibits filed in this action, the testimony of the witnesses
6 at the March 20th hearing, and the arguments of counsel, and
7 being fully advised, the court has determined that the govern-
8 ment's motion for summary judgment should be granted. Although
9 certain factual matters are in sharp dispute (see ¶ 13 of the
10 Findings of Fact filed April 7, 1978), those matters are not
11 material to a resolution of the legal issues raised by the
12 government's motion for summary judgment. See Rule 56(c),
13 Federal Rules of Civil Procedure. The undisputed facts and
14 the conclusions to be drawn therefrom, as set forth below,
15 shall constitute the court's findings of fact and conclusions
16 of law under Rule 52(a), Federal Rules of Civil Procedure.

17
18 I. The Facts--

19 This action involves the question whether plaintiffs are
20 entitled to continue receiving hydro-electric power generated
21 by certain Bureau of Reclamation dams along the Colorado
22 River. The allocation of water from the Colorado River, and
23 the sale of electric power generated by the power plants
24 associated with the storage reservoirs along it, have
25 occasioned much litigation. See, e.g., Arizona v. California,
26 373 U.S. 546 (1963); Arizona Power Authority v. Morton, 549
27 F.2d 1231 (9th Cir.), cert. denied, 434 U.S. 835 (1977);
28 Arizona Power Pooling Ass'n v. Morton, 527 F.2d 721 (9th Cir.

1 1975), cert. denied, 425 U.S. 911 (1976); Citizens Utilities
2 Co. v. United States, 149 F. Supp. 158 (Ct. Cl.), cert.
3 denied, 355 U.S. 892 (1957). These cases provide an overview
4 of the circumstances surrounding this action, and only such
5 background information as is pertinent to the controversy at
6 bar will be set forth.

7 The origins of this case lie in the initial allocation
8 of electric power to be produced by the as-then uncompleted
9 Boulder Canyon Project. In 1930 the Secretary of the Interior
10 entered into a series of contracts with various entities,
11 among them the City of Los Angeles, Southern California
12 Edison ("Edison"), and the Metropolitan Water District of
13 Southern California ("MWD"). The authority for these agree-
14 ments was the Boulder Canyon Project Act, 43 U.S.C. § 617
15 et seq., which required the Secretary to obtain contracts
16 which would produce sufficient revenue over a period of 50
17 years to repay the federal government, with interest, the
18 entire cost of construction of the dam, plus its operation
19 and maintenance. The City of Los Angeles and Edison undertook
20 to lease parts of the generating facilities to be built, and
21 committed themselves to take and pay for 64% of the electric
22 power which was to be generated, although other entities
23 could claim part of this amount. The MWD undertook to take
24 and pay for 36% of the power to be generated, but it was only
25 permitted to use its share of the power to pump water in the
26 Colorado River Aqueduct; which also had not yet been built.

27 In 1937 the MWD determined that the amount of power for
28

1 which it was obligated to pay would be in excess of its needs
2 through the end of 1954, and proposed that the Secretary
3 resell part of the power. Both the City of Los Angeles and
4 Edison declined to exercise their options to take this surplus
5 power, so the Secretary entered into contracts with various
6 other entities, including Citizens Utilities Company and
7 California-Pacific Utilities Company ("Cal-Pac"), under which
8 these entities were permitted to take and pay for some of the
9 MWD's surplus. Both Citizens Utilities' and Cal-Pac's
10 contracts were to expire on December 31, 1954, and contained
11 no provisions for renewal.

12 By 1945 the MWD had determined that its percentage of
13 Boulder Canyon Project power, generated at the Hoover power-
14 plant, would be in excess of its needs for the remainder of
15 its 50-year contract. However, both the City of Los Angeles
16 and Edison were then willing to exercise their options to take
17 and pay for the MWD's surplus power. Accordingly, in May
18 1945 the Secretary contracted with the City of Los Angeles
19 and Edison to take the unused portion of the MWD's power
20 allocation, the sale becoming effective after December 31,
21 1954.

22 Although Citizens Utilities and Cal-Pac applied for
23 renewal of their contracts in 1952, the Secretary refused
24 to continue the agreements beyond December 31, 1954. Citizens
25 Utilities and Cal-Pac ultimately filed suit to compel renewal,
26 and in Citizens Utilities Co. v. United States, supra, the
27 Court of Claims held that these two utilities were entitled
28

1 to renew their contracts within certain limitations. 149 F.
2 Supp. at 163.

3 As a result of the Citizens Utilities Company litigation,
4 Cal-Pac entered into Contract No. 14-06-300-802 with the
5 Secretary of the Interior on April 30, 1958 (the "1958 agree-
6 ment"). This agreement was subsequently amended in 1960,
7 1961 and 1962. One effect of these amendments was to change
8 the source of the power for Cal-Pac's Needles District from
9 the Hoover powerplant to the Parker-Davis Project, effective
10 January 1, 1963. By its own terms, the 1958 agreement was to
11 expire on December 31, 1977. In addition, the government
12 notified Cal-Pac on September 3, 1974, that the contract would
13 not be renewed. There is nothing in the record to indicate
14 that Cal-Pac, as a party to the 1958 agreement, has ever
15 objected to the government's decision not to renew the 1958
16 agreement.
17

18 For many years, ending on December 31, 1977, plaintiffs
19 jointly were among the beneficiaries to the 1958 agreement
20 between Cal-Pac and the federal government. During the winter
21 months (October through February), Cal-Pac's Needles District
22 received 4,500 kW of peak demand, some of which was resold
23 to plaintiffs; during the summer (March through September)
24 Cal-Pac received 6,000 kW of peak demand. This power was not
25 apportioned by Cal-Pac to any particular customers, rather
26 it was used to meet part of the needs of all the customers
27 in the Needles District. The demand for power by Cal-Pac's
28 customers in the Needles District exceeded the amount of

1 power available under the 1958 agreement in every month of
2 1977, and had done so for an indefinite period before that.
3 For the calendar year 1977, the difference between Cal-Pac's
4 customers' demand and the amount of power supplied by the
5 Parker-Davis Project ranged from a low of 1,661 kW of peak
6 demand in March to a high of 9,624 kW of peak demand in July.
7 In order to meet its customers' demand, Cal-Pac purchased
8 the balance of its requirements in thermally generated power
9 pursuant to a contract with the State of Nevada. The Parker-
10 Davis Project hydro-electric power supplied under the 1958
11 agreement was much cheaper than the steam-generated power
12 Cal-Pac bought from the State of Nevada.

13
14 On April 4, 1975, subsequent to notifying Cal-Pac that
15 the 1958 agreement would not be renewed, the Department of
16 the Interior published a "Notice of Proposed Reallocation
17 of Power" from the Parker-Davis Project and the Southern
18 Division of the Colorado River Storage Project ("CRSP-SD").
19 40 Fed. Reg. 15101 (1975). The CRSP-SD had 26,650 kW of firm
20 power which had not previously been allocated. The Parker-
21 Davis Project had a capacity of 254,000 kW, 39,000 kW of
22 which had previously gone to priority uses (operation of
23 irrigation and reclamation projects), 174,500 kW of which
24 was permanently allocated, 19,500 kW of which was allocated
25 on a withdrawable basis and reserved for future priority
26 uses, and 21,000 kW of which was sold to private utilities.
27 It is out of this latter 21,000 kW that Cal-Pac drew its
28 share of hydro-electric power.

1 The April 4, 1975 "Notice of Proposed Reallocation of
2 Power" set forth a reallocation scheme which attempted to
3 integrate the allocation of available CRSP-SD and Parker-Davis
4 Project power. Only the previously uncommitted 26,650 kW
5 of CRSP-SD power was affected, while the whole of the Parker-
6 Davis Project's capacity was to be reallocated. The primary
7 effect of the Parker-Davis reallocation, however, was to
8 redistribute the 21,000 kW previously sold to Citizens
9 Utilities and Cal-Pac to other categories of users. The
10 notice asked for comments on the proposed reallocation to
11 be submitted to the Bureau of Reclamation on or before June 3,
12 1975. Nineteen interested parties submitted comments, and
13 meetings were held on June 3, 1975 with the 4 entities which
14 had requested them. None of the plaintiffs submitted comments
15 or requested a meeting. On October 1, 1975, the Department
16 of the Interior published the "Final Allocation of Power,"
17 together with comments concerning the changes from the
18 previously published proposal. 40 Fed. Reg. 45209 (1975).

19 These power allocations were of what is known as "firm
20 power" or "capacity with energy." Firm power is the amount
21 the generating station can commit itself to deliver continu-
22 ously. This is a conservative estimate, based on project
23 installed capacity, water flows experienced and projected
24 on the river, storage conditions, and requirements for re-
25 serves, plant use and losses. It also takes into account
26 load diversity, which involves a calculation of when various
27 customers will make their peak demands on the system. When
28

there is a higher-than-usual volume of water flowing down the river, the actual amount of power generated by the system may be higher than the calculated capacity required to serve the estimated load demand, upon which the allocations of firm power are based. In that case, there will be extra power available for sale on a short-term basis. In contrast, if river volume is greatly reduced, actual generating capacity may drop below the amount of firm power allocated. In this latter case, the government is required to turn to other sources and, if necessary, purchase power so that it can meet its firm commitments.

Firm power is to be contrasted with "peaking power" or "capacity without energy." Hydro-electric plants can vary their power output relatively easily by changing the amount of water flowing through the power plant, while thermal plants run more efficiently at a continuous, even rate. During periods of peak demand, the hydro-electric plants can increase their output to meet the demand by releasing a greater proportion of their daily water flow during those hours, thus providing peaking power. This peaking power must be repaid by the user, however, usually by returning thermally generated power into the electrical grid at off-peak hours. This return of power enables the hydro-electric plant to meet its power commitments to other users during the off-peak hours, while at the same time reducing its release of water and hence its power output. This distinction between firm and peaking power is important, because Cal-Pac's allocation of power

1 under the 1958 agreement was, and what plaintiffs now are
2 seeking is, a long-term allocation of firm power. See
3 generally Transcript of Hearing of March 20, 1978, at 23-36;
4 Affidavit of Robert A. Olson, filed March 20, 1978; Affidavit
5 of Marlene A. Moody, filed March 1, 1978; Colorado River
6 Storage Project, General Power Marketing Criteria, 43 Fed.
7 Reg. 5559-64 (Feb. 9, 1978); Colorado River Storage Project,
8 Notice of Proposed Allocation of Peaking Power, 40 Fed. Reg.
9 59362-64 (1975).

10 II. The Parties and Claims--

11 The plaintiffs must be divided into two groups for
12 analytical purposes. The Fort Mojave Indian Tribe (the
13 "Indian plaintiffs") is a duly recognized Indian tribe, whose
14 reservation extends into areas of California, Arizona and
15 Nevada near the Colorado River. The City of Needles ("the
16 City") is a municipal corporation organized under the laws of
17 the State of California. The Needles Unified School District
18 and the Needles-Desert Community Hospital District are
19 special districts which provide educational and medical
20 services to the Needles area. For the purpose of this case,
21 the legal position of the two districts is identical to that
22 of the City, and they will collectively be referred to as the
23 "non-Indian plaintiffs."
24

25 The defendants are the federal government, the Secre-
26 taries of Energy and the Interior, and the Bureau of Reclam-
27 ation of the Department of the Interior. It should be noted,
28 however, that on October 1, 1977, the power marketing functions

1 which had been handled for the Department of the Interior
2 by the Bureau of Reclamation's Lower Colorado Regional Office
3 in Boulder City, Nevada, were transferred to the Department
4 of Energy. The responsible agency thus became the Western
5 Area Power Administration's Lower Colorado Area Office. It
6 appears that this transfer was merely administrative, with the
7 functions and personnel being shifted from one department
8 to another without any change in either their authority or
9 the applicable law.

10 The first amended complaint sets forth five separate
11 causes of action. The first is asserted only by the Indian
12 plaintiffs, and is based on a theory of breach of fiduciary
13 duty. The Indians claim that the defendants are the legal
14 trustees of the Fort Mojave Indian Tribe, and owe a duty as
15 trustees to make the Indian's assets (the utilization of their
16 ancestral lands) productive. This duty is alleged to have
17 been breached by virtue of a conflict of interest between the
18 Bureau of Reclamation and the Bureau of Indian Affairs--
19 the Bureau of Reclamation is asserted to be depriving the
20 Indians of electric power which the Indians claim the Bureau
21 of Indian Affairs is under an affirmative duty to provide.
22 In this connection, the Indian plaintiffs rest on their claim
23 to be preference customers entitled to a priority in the
24 allocation of available power under the general reclamation
25 laws, and they do not cite any statutes or treaties which
26 would specifically grant them any given amount of power or
27 power from any particular source.
28

1 The second claim, also asserted solely by the Indian
2 plaintiffs, is closely related. The Indians argue that they
3 are entitled to a statutory preference in the allocation of
4 power under section 9(c) of the Reclamation Project Act of
5 1939, 43 U.S.C. § 485h(c). The claim appears to be that as
6 a member of the class of preference customers, the Indians
7 are on equal footing with other preference customers, and
8 since the federal government is in a fiduciary relationship
9 with respect to the Indians, the fiduciary duties are properly
10 discharged only by allocating power to the Indians. The
11 Indians allege that the failure to allocate power to them
12 constitutes an actionable breach of a statutory duty by the
13 trustee.
14

15 The third cause of action, again asserted by the Indian
16 plaintiffs alone, is for violation of the National Environ-
17 mental Policy Act ("NEPA"). The Indians argue that the
18 federal government's decision not to renew the 1958 agree-
19 ment, and to reallocate the Parker-Davis Project power pre-
20 viously furnished to Cal-Pac, is governmental action which
21 has a demonstrable effect on the environment. Since no
22 Environmental Impact Statement was prepared and no public
23 hearings were held on the environmental consequences of this
24 action, the Indians claim the requirements of NEPA were not
25 met.
26

27 The fourth cause of action is asserted only by the non-
28 Indian plaintiffs. It alleges a denial of due process of law
in that these plaintiffs, as preference customers under the

1 reclamation laws, "were never consulted, advised or otherwise
2 dealt with by the defendants regarding a loss of their elec-
3 trical lifeblood prior to a decision to so deprive them."
4 This decision is claimed to have been made on or before
5 September 3, 1974, when the government informed Cal-Pac the
6 1958 agreement would not be renewed. This decision is
7 characterized as arbitrary and unreasonable administrative
8 action, which plaintiffs claim is judicially reviewable under
9 5 U.S.C. § 702 and 28 U.S.C. § 1331.

10 The fifth cause of action again is alleged only by the
11 non-Indian plaintiffs, and is essentially identical to the
12 NEPA claim asserted by the Indian plaintiffs in the third
13 cause of action. None of the plaintiffs seek monetary damages,
14 but only declaratory and injunctive relief as to each cause
15 of action.

16
17 III. Discussion--

18 The basic statute involved in this case is the Reclamation
19 Project Act of 1939, and in particular section 9. Under
20 section 9(c) of the Act (43 U.S.C. § 485h(c)), the Secretary
21 of the Interior is authorized to enter into contracts for
22 the sale of water and electric power contained by or produced
23 in connection with federal reclamation projects. Although
24 the Secretary is granted wide discretion as to whom electric
25 power shall be sold, at what price, and upon what other terms,
26 this discretion is not entirely unbounded. The most important
27 qualification to this power for purposes of this action is
28 contained in the "preference" clause of section 9(c), which

1 provides that "in said sales or leases preference shall be
2 given to municipalities and other public corporations or
3 agencies" and to REA cooperatives. This class of consumers
4 is generally known as "preference customers." In almost
5 every geographic area the demand for power by preference
6 customers exceeds the supply; consequently, little power
7 is sold to non-preference customers except under special
8 statutory provisions, most of which antedate the Reclamation
9 Project Act of 1939.

10 Cal-Pac, as an investor-owned utility, is not a pre-
11 ference customer. Its entitlement to power arose from
12 unique circumstances, which have been set forth above. For
13 the purpose of this motion only, the government has conceded
14 plaintiffs' claim that each of the entitles joined as a party
15 plaintiff qualifies for a section 9(c) preference. Since
16 each of the plaintiffs is assumed to be a preference customer,
17 and since it is undisputed that the demand for federal hydro-
18 electric power from the Parker-Davis Project by preference
19 customers alone far exceeds the amount available for sale,
20 the principal question is how the available power should be
21 apportioned among those preference entities which wish to
22 purchase it. In this regard, the Court of Appeals' recent
23 decision in City of Santa Clara v. Andrus, 572 F.2d 660 (9th
24 Cir. 1978), is controlling.

25
26 The Santa Clara case involved the allocation of federally
27 generated hydro-electric power from the California Central
28 Valley Project. Although the authorizing legislation for the

1 Central Valley Project differs from that of the projects
2 along the Colorado River, the authority under which the
3 decision to allocate power is made is the same--section 9(c)
4 of the Reclamation Project Act of 1939. While the Santa Clara
5 decision does not directly touch on the Indian's fiduciary
6 duty claims, it does discuss the justiciability of the con-
7 troversy at length, and directly addresses the due process,
8 arbitrary administrative action, and NEPA claims raised here.

9 In Santa Clara, as in this action, the demand for electric
10 power by preference customers far exceeded the amount available.
11 The Court of Appeals was thus confronted with the question
12 whether the Secretary of the Interior's power marketing
13 decisions were judicially reviewable, or whether they were
14 immune from judicial review as matters "committed to agency
15 discretion by law" within the meaning of section 10 of the
16 Administrative Procedure Act, 5 U.S.C. § 701(a)(2).
17

18 Generally speaking, administrative decisions are subject
19 to judicial review except where the exercise of that decision-
20 making power is wholly discretionary, i.e., where there is
21 "no law to apply" in judging the propriety of the action.

22 "If . . . no law fetters the exercise of administrative
23 discretion, the courts have no standard against which to
24 measure the lawfulness of agency action. In such cases
25 no issues susceptible of judicial resolution are pre-
26 sented and the courts are accordingly without juris-
27 diction."

28 City of Santa Clara v. Andrus, supra, 572 F.2d at 666.

1 The Ninth Circuit described the operation of the pre-
2 ference clause in the Reclamation Project Act of 1939 in
3 these terms:

4 "The preference clause requires only that public
5 entities be given a preference over private entities
6 in the marketing of power generated by federal reclamation
7 projects. [Citation omitted]. It does not require
8 that all preference customers be treated equally or
9 that all potential preference customers receive an
10 allotment. [Citation omitted]. Where, as here, one
11 preference entity challenges the Secretary's decision
12 to discriminate against it in favor of other preference
13 entities, the reclamation laws provide no law to apply
14 to the dispute. If he so chooses, the Secretary can
15 market all available . . . power to a single public
16 entity without running afoul of the preference clause."
17 Id. at 667 (emphasis in original). The court summarized its
18 examination of the authorities in the following words:
19

20 "We conclude that the Secretary's refusal to
21 allocate nonwithdrawable power to Santa Clara is un-
22 reviewable because there is 'no law to apply.' The
23 preference clause contained in the Reclamation Project
24 Act of 1939 does not prevent the Secretary from discrim-
25 inating against some preference entities to the benefit
26 of others. . . . Decisions concerning the proper
27 allocation of . . . power among preference entities
28 are 'action committed to agency discretion by law'

1 within the meaning of the APA and as such are
2 unreviewable."

3 Id. at 668 (footnote omitted).

4 The first amended complaint does not allege that non-
5 preference entities have been given an allocation of Parker-
6 Davis Project or CRSP-SD power, but is only "one preference
7 entity challeng[ing] the Secretary's decision to discriminate
8 against it in favor of other preference entities"

9 Id. at 667. Similarly, the first amended complaint does not
10 challenge "the adequacy of procedures utilized in formulating
11 the marketing scheme" Id. at 673; see id. at 672-75.

12 Plaintiffs attempt to avoid the conclusion that Santa
13 Clara makes the Secretary's decisions non-reviewable here by
14 arguing that they were never given an opportunity to apply
15 for power as preference entities before the 1975 reallocation
16 was finalized. This circumstance, they submit, makes this
17 case more closely resemble Arizona Power Pooling Ass'n v.
18 Morton, supra, than it does Santa Clara. There are two flaws
19 to this argument. The first is that it was undisputed that
20 non-preference entities had been permitted to contract for
21 power in Arizona Power Pooling, while there were preference
22 customers who wished a firm power allocation. In this case
23 there is no allegation that any non-preference customer
24 received an allocation of power when the Parker-Davis Project
25 and CRSP-SD reallocations were made in 1975. The second flaw
26 lies in the fact that while the allocations in Arizona Power
27 Pooling were apparently made without notice to interested
28

1 individuals, in this case public notice was given.

2 Although it is true that in 1974 the government did not
3 notify Cal-Pac's customers, as opposed to Cal-Pac itself, that
4 the 1958 agreement would not be renewed, no authority has
5 been cited for the proposition that notice to the customers
6 was required. When the Bureau of Reclamation was ready to
7 undertake the reallocation, both the "Notice of Proposed
8 Reallocation of Power" and the "Final Allocation of Power"
9 were published in the Federal Register. 40 Fed. Reg. 15101
10 (1975); 40 Fed. Reg. 45209 (1975). That publication was
11 sufficient as a matter of law to put plaintiffs on notice
12 of the proposed administrative action and of their right to
13 be heard concerning the proposal. 44 U.S.C. §§ 1507-08.
14 Consequently, this case is legally indistinguishable from
15 Santa Clara, and the court concludes that the Secretary's
16 decision not to grant plaintiffs an allowance of power during
17 the 1975 reallocation is not judicially reviewable.

18
19 Santa Clara also forecloses the due process claim that
20 the non-Indian plaintiffs have raised. The Court of Appeals
21 held that the plaintiffs there "ha[d] no 'property' interest
22 in CVP power as against other preferred entities and con-
23 sequently no procedural safeguards are constitutionally
24 required in deciding between them." 572 F.2d at 676. That con-
25 clusion applies with equal force to this action.

26 The NEPA claims raised by all the plaintiffs are also
27 precluded by Santa Clara. The Ninth Circuit held that the
28 decision to allocate or withdraw power was not a "major

1 Federal project" which could be characterized as "significantly
2 affecting the quality of the human environment" within 42
3 U.S.C. § 4332(a)(C). The court's comment was:

4 "Because the amount of low cost CVP power is
5 finite, demand will likely outstrip supply in the future
6 as it has in the past. Regardless of whether it is Santa
7 Clara or some other preference entity that is forced
8 to look to private sources for the supply of electric
9 power, the environmental consequences will be similar.
10 If the demand for power exceeds the available supply,
11 then new generating facilities must be constructed
12 somewhere, if not in Santa Clara.
13

14 Even accepting as true Santa Clara's rather fanciful
15 hypotheses concerning the likely impact of the Secretary's
16 decisions on its small piece of the environment, we think
17 it highly improbable that one allocation scheme will have
18 a more deleterious impact than any other when the total
19 geographic area served by the CVP is considered. . . .
20 [A]n agency must consider 'in deciding whether a major
21 federal action will "significantly" affect the quality
22 of the human environment . . . the absolute quantitative
23 adverse environmental effect of the action itself.' No
24 such absolute effects are threatened by the Secretary's
25 decision to allocate CVP power in one way rather than
26 another."

27 City of Santa Clara v. Andrus, *supra*, 572 F.2d at 680.

28 A careful review of the first amended complaint and the

1 various affidavits which have been filed reveals no factual
2 averments which would distinguish the claimed environmental
3 impact from that asserted in Santa Clara. The Indian
4 plaintiffs argue that their agricultural economy will be
5 injured by the increased cost of pumping irrigation water,
6 and the non-Indian plaintiffs similarly claim injury from
7 the increased cost of all-thermal electric power over the
8 former thermal/hydro-electric mix. This is not a case where
9 plaintiffs either receive Parker-Davis Project power or no power
10 at all; on the contrary, their power demands are being met
11 in full by Cal-Pac from the supply of thermal power which
12 Cal-Pac is purchasing from the State of Nevada. Unlike Santa
13 Clara, there is no claim that any environmentally degrading
14 power plants will have to be constructed in the Needles area.
15 Neither construction of new generating plants and trans-
16 mission lines, nor destruction of existing facilities, was
17 required by the reallocation. Accordingly, the court finds
18 that the power reallocation at issue here was not a "major
19 Federal [action] significantly affecting the quality of the
20 human environment" within the meaning of the National Environ-
21 mental Policy Act, and hence neither an EIS nor public
22 hearings were necessary.

24 The one issue raised by the plaintiffs which was not
25 resolved by Santa Clara is the Indian plaintiffs' claim that
26 the federal government has breached a fiduciary duty owed
27 to the Fort Mojave Indian Tribe by not giving them a firm
28 allocation of Parker-Davis Project power. This contention

1 may be resolved on the legal question whether such a duty
2 exists, and is thus susceptible to resolution via summary
3 judgment.

4 As noted above, except for section 9(c) of the Reclamation
5 Project Act of 1939, no statute, regulation or treaty has
6 been cited in support of this contention. To the extent that
7 the Indian plaintiffs purport to find a duty imposed upon
8 the government in the preference clause, the breadth of the
9 Secretary's discretion in power marketing decisions recognized
10 by the Court of Appeals in Santa Clara negates the existence
11 of an actionable "duty." This is not the only string to the
12 Indians' bow, however, since there appear to be two alternative
13 theories raised. First, it is argued that since the Fort
14 Mojave Indian Tribe has rights to irrigation water from
15 the Colorado River, and water is used to generate power,
16 they also have the right to an allocation of hydro-electric
17 power. Second, the Indian plaintiffs contend that the Bureau
18 of Indian Affairs is under an affirmative duty, as a trustee,
19 to supply the Fort Mojave Indian Tribe with low-cost electric
20 power so that the Indians' assets--the utilization of their
21 ancestral lands--can be made productive. This affirmative
22 duty, it is argued, is in conflict with the Bureau of
23 Reclamation's decision not to allocate firm electric power
24 to the Indians.
25

26 The Fort Mojave Indian Tribe has "Winters doctrine" rights
27 to irrigation water from the Colorado River. See Winters v.
28 United States, 207 U.S. 564, 576 (1908). These rights were

specifically reaffirmed in Arizona v. California, supra, 373 U.S. at 595-601, and were quantified in the Supreme Court's decree. Arizona v. California, 376 U.S. 340, 345 (1964). That decree, however, only dealt with the apportionment of the "consumptive use" of water from the Colorado River, and neither the opinion nor the decree in Arizona v. California made any mention of rights to hydro-electric power generated through use of mainstream flow. The generation of hydro-electric power is not a consumptive use of the water, and the use of the river to generate power has been given a lower priority than either flood control or irrigation and other consumptive uses. See Boulder Canyon Project Act § 6, 43 U.S.C. § 617e, quoted in Arizona v. California, supra, 373 U.S. at 584. The need for and right to consumptive uses of water bears no relationship to the need for and claim to hydro-electric power by any individual or entity. Finally, water for consumptive use is a limited resource in ways that electricity is not, and the pressing reasons which impelled the Supreme Court to make a final allocation of water for consumptive use are not present here. See Arizona v. California, supra, 373 U.S. at 550-64. For these reasons, Winters doctrine rights do not provide a basis for a claim to an allocation of power generated by the river's flow.

The question whether the federal government has breached a duty as trustee to supply electric power to the Indians is a more difficult matter. "There is no doubt that the United States serves in a fiduciary capacity with respect to these

1 Indians and that, as such, it is duty bound to exercise great
2 care in administering its trust." United States v. Mason,
3 412 U.S. 391, 398 (1973). Yet merely reciting this principle
4 fails to convey any notion as to its content. As best as can
5 be determined from the first amended complaint, the Indian
6 plaintiffs are alleging (1) that the Bureau of Indian Affairs
7 is under an affirmative duty to supply low-cost electric
8 power to the Fort Mojave Indian Tribe so that the Indians'
9 assets--their agricultural lands--can be irrigated and hence
10 made productive; and (2) that the Bureau of Reclamation's
11 refusal to supply federal hydro-electric power to the Indians
12 places it in conflict with the affirmative duty owed by the
13 Bureau of Indian Affairs, and hence the Department of the
14 Interior has a conflict of interest which must be resolved
15 in favor of the Indians.
16

17 The Indians' argument thus rests on the assertion that
18 one component of the Bureau of Indian Affairs' duty toward
19 them is to provide not just electric power but a supply of
20 low-cost electric power. Plaintiffs cite neither direct
21 statutory nor judicial authority for this proposition. Rather,
22 it is claimed to flow from the trustee's duty to make trust
23 assets productive. Yet the cases plaintiffs cite in support
24 of this argument--Manchester Bank of Pomo Indians, Inc. v.
25 United States, 363 F. Supp. 1238 (N.D. Cal. 1973), and
26 Menominee Tribe of Indians v. United States, 59 F. Supp. 137
27 (Ct. Cl. 1945)--are not on point. Both cases involved the
28 government's mismanagement of funds generated by tribal

1 enterprises. The government held the funds in trust accounts,
2 but either failed to credit any interest to the accounts or
3 credited too low a rate. In this case, it appears that the
4 Indians, and not the government, have active management and
5 control over the trust assets which the Indians claim the
6 government is responsible for making productive.

7 The Fort Mojave Indian Tribe is organized under the
8 provisions of the Indian Reorganization Act of 1934, 25 U.S.C.
9 § 461 et seq. Under section 16 of the Act (25 U.S.C. § 476),
10 the Indians "operate under a recognized system of self-govern-
11 ment, with a constitution and a business charter which cannot
12 be revoked or surrendered except by Act of Congress." Fort
13 Mojave Tribe v. County of San Bernardino, 543 F.2d 1253, 1255
14 (9th Cir. 1976), cert. denied, 430 U.S. 983 (1977); see
15 Affidavit of Llewellyn Barrackman, filed Jan. 25, 1978.
16 Although the government holds title to the reservation land
17 in trust for the Fort Mojave Indian Tribe as a whole, the
18 elected leaders actively manage the trust lands in accordance
19 with the tribal economic development plan. The extent of
20 this management power is illustrated by the fact that the
21 Indians have entered into 99-year leases with non-Indians
22 for development of part of the reservation. Fort Mojave Tribe
23 v. County of San Bernadino, supra. This substantial control,
24 exercised directly by the Indians, argues strongly against
25 the existence of the asserted duty on the part of the govern-
26 ment to supply low-cost electric power.

27
28 The fact that the Commissioner of Indian Affairs

1 interceded on behalf of other Indian tribes along the Colorado
2 River in the 1975 reallocation of Parker-Davis Project and
3 CRSP-SD power (see 40 Fed. Reg. 15101 (1975)) does not advance
4 plaintiffs' argument. The record is devoid of any information
5 which would explain either what impelled that intervention,
6 or why it was made on behalf of other tribes but not the
7 Fort Mojave Indians. Indeed, although that intervention may
8 have been influential, given the discretion vested in the
9 Secretary of the Interior in making power marketing decisions,
10 that intervention cannot be said to have compelled the
11 allocation of any particular amounts of power to any partic-
12 ular entities. Further, plaintiffs have not named the
13 Bureau of Indian Affairs as a party defendant, although the
14 Bureau of Reclamation is named, and the first amended complaint
15 contains no factual allegations that the Bureau of Indian
16 Affairs, as opposed to the Bureau of Reclamation, has done
17 or failed to do any act which would fall short of fulfillment
18 of its fiduciary duty.
19

20 Finally, it is important to note that the power to which
21 the plaintiffs claim to be entitled has never heretofore been
22 recognized as "theirs." On the contrary, the power entitle-
23 ment has always belonged to Cal-Pac. None of the plaintiffs
24 have ever had an interest in the power other than as inciden-
25 tal beneficiaries to the 1958 agreement, although under that
26 agreement both the City and the Indians had the right, if
27 they acquired their own distribution system, to contract
28 directly with the Bureau of Reclamation for part of Cal-Pac's

1 hydro-electric power. Plaintiffs did not take up that
2 opportunity prior to the expiration of the 1958 agreement.
3 Each of the plaintiffs has contracted with Cal-Pac for the
4 delivery of electric power from whatever source Cal-Pac
5 purchases it. On these facts, and on the authorities
6 plaintiffs have cited, the assertion that the Bureau of
7 Indian Affairs is under an affirmative duty to supply the Indi-
8 an plaintiffs with hydro-electric power is unsupported.
9 Accordingly, the court holds that, as a matter of law, the
10 Bureau of Indian Affairs is under no such affirmative duty
11 toward the Fort Mojave Indian Tribe.

12 It is well recognized that the interests and respon-
13 sibilities of the Bureau of Indian Affairs may differ from
14 those of other sections of the Department of the Interior,
15 and that a conflict of interest may thereby arise within the
16 Department. See, e.g., Navajo Tribe of Indians v. United
17 States, 364 F.2d 320 (Ct. Cl. 1966)(Bureau of Mines); Pyramid
18 Lake Paiute Tribe of Indians v. Morton, 354 F. Supp. 252
19 (D.D.C. 1973), rev'd on other grounds, 499 F.2d 1095 (D.C.
20 Cir. 1974), cert. denied, 420 U.S. 962 (1975)(Bureau of
21 Reclamation). In this case, however, no such conflict has
22 arisen. The Bureau of Indian Affairs has no affirmative duty
23 to provide low-cost electric power to the Indian plaintiffs,
24 as contrasted with the fiduciary duties with respect to the
25 oil and gas leases in Navajo Tribe or the Paiute's water
26 rights in Pyramid Lake. Since none of the plaintiffs here
27 have any rights to electric power superior to those of other
28

1 potential preference customers, and since the allocation of
2 power among competing preference customers is "committed to
3 agency discretion by law," the court concludes that the
4 Department of the Interior has not been guilty of a breach
5 of fiduciary duty or a conflict of interest in its power
6 allocation as a matter of law.

7 It should also be noted that the 1975 power reallocation
8 scheme made provision for the future needs of the Indians
9 along the Colorado River for electric power for irrigation.
10 This was done by allocating 19,500 kW of summer peak demand
11 and 13,900 kW of winter peak demand to non-Indian preference
12 customers on a "two-year withdrawable" basis. This power
13 is available for the Fort Mojave Indian Tribe upon application,
14 and the Indians have had actual knowledge of the availability
15 of this power since at least September 1976. See 40 Fed. Reg.
16 15102 (1975); 40 Fed. Reg. 45210 (1975); Affidavit of Marlene
17 A. Moody, filed Mar. 1, 1978. The record is unclear whether
18 the Indian plaintiffs have actually submitted an application
19 for two-year withdrawable power for irrigation purposes.

20
21 For the reasons set forth above, the court concludes
22 that the defendants are entitled to summary judgment. The
23 Secretary of the Interior's power marketing decision, when
24 all the power is apportioned among priority uses and pre-
25 ferences customers, is judicially unreviewable under City
26 of Santa Clara v. Andrus, supra, as a matter "committed to
27 agency discretion by law." As preference customers,
28 plaintiffs have no constitutional rights under the due

process clause as against other preference customers in
determining the allocation of electric power between them.
Neither an Environmental Impact Statement nor public environ-
mental hearings were necessary under the National Environ-
mental Policy Act, as the power marketing decisions at issue
here were not major Federal projects significantly affecting
the quality of the human environment. Finally, the Bureau
of Indian Affairs has no affirmative duty to supply the
Indian plaintiffs with low-cost federal hydro-electric power,
and as a matter of law the defendants have not breached any
fiduciary duty they may have toward the Indians.

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1 Counsel for both sides are directed to file appropriate
2 documents within ten days if they believe any Findings or
3 Conclusions necessary to the foregoing decision have been
4 omitted or erroneously stated. Counsel for the government
5 is directed to file a form of separate judgment.

6 IT IS SO ORDERED.

7
8 DATED: July 6, 1978
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14 United States District Judge
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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

RECEIVED

JUL 13 1983

OFFICE OF THE CLERK
SUPREME COURT, U.S.

ARKANSAS POWER & LIGHT COMPANY,
et al.,

Plaintiffs,
v.

82-1071

JAMES R. SCHLESINGER, Secretary of
Energy, et al.,

Defendants.

Civil Action No. 79-1263

FILED

OCT 20 1980

MEMORANDUM OPINION

JAMES E. DAVEY, Clerk

This matter comes before the court on cross-motions for summary judgment. The facts from which the suit arises are not disputed.

In the early 1950s the United States government contacted the plaintiffs, Arkansas Power and Light Company and Reynolds Metal Company, regarding possible production of aluminum at a new site in Arkansas. Following lengthy negotiations, in January, 1952, plaintiffs entered into a contract with the Southwestern Power Administration (SWPA). SWPA was established by the Secretary of Interior in 1943 to dispose of electrical power and energy generated by federally-owned reservoir projects in six southwestern states.

The contract at issue obligates SWPA to provide electricity to plaintiffs for a thirty-year period beginning January 1, 1954 and ending December 31, 1983. The original contract specified fixed prices for certain amounts of electricity and allowed for limited price increases over time. A supplemental agreement dated April 25, 1952 modified the original contract by providing for certain maximum rate increases at the end of each five-year period in the thirty-year contract.

LOGGING

On April 28, 1952, the Federal Power Commission (FPC) confirmed and approved the schedule of rates and charges in the contract as supplemented by the April 25, 1952 modification. 1/ The FPC specifically found that the rates and charges conformed to the standards set forth in section 5 of the Flood Control Act of 1944. 11 F.P.C. 959, 960 (1952).

Following approval of the contract by the FPC, Reynolds built a new aluminum plant at a cost of nearly \$38 million and Arkansas Power and Light constructed new transmission lines and other facilities at a cost of \$6 million. The plant was placed in operation and service under the contract began in late 1953.

Pursuant to directions from the Secretary of Interior to eliminate a financial deficit in its operations, on March 1, 1979, SWPA raised the prices it charges plaintiffs for electricity above those allowed by the contract. Order Confirming, Approving, and Placing Increased Power Rates In Effect On An Interim Basis, 44 Fed. Reg. 13,068 (March 1, 1979). Plaintiffs then filed this action for breach of contract.

The government contends that the price increase at issue was not only allowed, but required by section 5 of the Flood Control Act of 1944, 16 U.S.C. § 825s. That section provides that

1/ The authority to confirm rates under Section 5 of the Flood Control Act was transferred to the Secretary of Energy by Section 402 of the Department of Energy Organization Act, 42 U.S.C. § 7171 et seq. The transfer has no effect on the outcome of this case.

Rate schedules shall be drawn having regard to the recovery...of the cost of producing and transmitting such electric energy, including the amortization of the capital investment allocated to power over a reasonable period of years. Preference in the sale of such power and energy shall be given to public bodies and cooperatives.

The core issue then, is whether the Flood Control Act permits the government to abrogate contracts when they have proven inadequate to cover the costs of supplying electric power.

The government finds some support in Associated Electric Cooperative, Inc. v. Morton, 165 U.S. App. D.C. 344, 507 F.2d 1167 (1974), cert. denied, 423 U.S. 830 (1975). There the court upheld the authority of the Secretary of the Interior to collect increased charges under section 5 of the Flood Control Act. An important distinction between the case and this one is that there the court found that the increased charges were authorized by the contract at issue. ^{2/} In this case it is not disputed that the increased charges SWPA have imposed are not allowed by the contract. See 11 F.P.C. 959, 960 (1959) (setting maximum permissible increases for each five-year period during the life of the contract).

However, in dictum the Associated Electric Cooperative court noted,

Even assuming that the transmission charges were precluded by the terms of the...contract, the transmission charge is nevertheless within the Secretary's rate-making power under the Flood Control Act. It is well settled that a Government agency cannot contract in derogation of its statutory powers.

^{2/} The contract at issue in Associated Electric Cooperative clearly indicated that "rates may be increased or decreased by SWPA, subject to approval of the FPC." Associated Electric Cooperative, Inc., supra, 507 F.2d at 1172.

307 F.2d at 175 n.17. This would allow the government to repudiate a contract which was invalid at the time it was entered into. Cf. Grand River Dam Authority v. National Gypsum Co., 352 F.2d 130 (10th Cir. 1965).

The contract at issue in this case was valid when it was entered into in 1952. Clearly it was drawn with regard to recovery of costs, because as indicated above, the provisions relating to rates and charges were modified to enable the FPC to make the finding required by law that the contract conformed to section 5 of the Flood Control Act. No evidence indicates that the rates were not adequate to cover costs when they were established in 1952.

The dictum in Associated Electric Cooperative is not authority for the proposition that the government can alter or repudiate a contract which was valid at the time it was entered into, but later becomes disadvantageous because of changing economic conditions. Similarly, nothing in the legislative history cited to this court indicates that Congress intended the Flood Control Act to give the government authority to unilaterally alter existing contracts.^{3/}

This case is closely analogous to Grand River Dam Authority, supra. There a state dam Authority was required by statute to charge rates for water and power sufficient to meet operating and maintenance costs. The Authority entered into a twenty-five year contract for sale of water and steam. Ten years later it attempted to raise the rates above contract levels.

^{3/} This is also consistent with the position the FPC took in 1957 when the Secretary of Interior sought approval of a new rate schedule inconsistent with that established in the contract. Denying the Secretary's request, the FPC stated that it did not have the power to determine that rates specified in a previously executed contract are no longer effective. 18 F.P.C. 153, 156 (1957).

The court noted that the Authority was obligated to set rates which would comply with the statute, and that it presumably performed that duty. The court held that

The fact, if it be a fact, that actual experience has shown the prospective determination of the rates, although fully adequate at the beginning of the contract term, later turned out to be inadequate, does not retroactively make the initial determination improper or unlawful and does not render void the contract rates.

352 F.2d at 138. The same reasoning applies in this case and leads the court to conclude that the Flood Control Act does not authorize revision of this contract. 4/

The government also contends that the last sentence of section 5, which establishes a preference for public bodies and cooperatives in the allocation of federally-owned power, requires higher prices to be charged to the plaintiffs. According to the government, to allow the present non-compensatory rates to remain in effect would be to force SWPA to charge higher rates to its other buyers, including public bodies and cooperatives, in direct contravention of the statutory preference.

However, the government admits that the demand for power by preference entities was less than the available supply of power and that the allocation of power to plaintiffs was permissible at the time the contract was originally executed. Defendants' motion at 23. Determination of compliance with statutory preference requirements, like that of recovery of costs, must be made at the time the contract is executed and is not intended to permit subsequent revision of power contracts. City of Anaheim v. v. Kleppe, 590 F.2d 285 (9th Cir. 1978); City of Santa Clara v. Andrus, 572 F.2d 660 (9th Cir.), cert. denied, 439 U.S. 859 (1978).

4/ This conclusion makes it unnecessary to consider whether defendants' actions comported with procedural rulemaking requirements.

Plaintiffs entered into a long-term contract with provisions for periodic rate increases up to specified maximums in order to protect themselves from changing economic conditions. A change in precisely those conditions does not afford the government a justification for unilaterally altering the disputed contract.

An appropriate Order accompanies this Memorandum Opinion.


UNITED STATES DISTRICT JUDGE

No. 82-1071

Office - Supreme Court, U.S.
FILED
OCT 12 1983
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CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1983

ALUMINUM COMPANY OF AMERICA, et al.,
Petitioners,

v.

CENTRAL LINCOLN PEOPLES' UTILITY DISTRICT, et al.
Respondents,

and

PETER JOHNSON, as Administrator of the BONNEVILLE POWER
ADMINISTRATION, Department of Energy, and
DONALD PAUL HODEL, as Secretary of the DEPARTMENT OF
ENERGY, and the UNITED STATES OF AMERICA,
Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENTS
CENTRAL LINCOLN PEOPLES' UTILITY DISTRICT, et al.

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QUESTION PRESENTED

Whether legislation that expressly preserves the longstanding priority of publicly-owned utilities to all power sold by the Bonneville Power Administration, nevertheless, abolishes by implication that priority for nonfirm energy sales and requires Bonneville to sell nonfirm energy first to fourteen private industries?

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| Arizona Power Pooling Association v. Morton, 527 F.2d 721 (9th Cir. 1975), <i>cert. denied sub nom.</i> Arizona Public Service Co. v. Arizona Power Pooling Association, 425 U.S. 911 (1976) | 47 |
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| City of Santa Clara v. Andrus, 572 F.2d 660 (9th Cir. 1978) <i>cert. denied sub nom.</i> Pacific Gas & Electric Co. v. City of Santa Clara, 439 U.S. 859 (1978) | 5, 47 |
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| E.E.O.C. v. Associated Dry Goods Corp., 449 U.S. 590 (1981) | 45 |
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| Port of Astoria v. Hodel, 8 E.R.C. (BNA) 1156 (D.Or. 1975), <i>aff'd</i> 595 F.2d 467 (9th Cir. 1979) | 21 |
| Power Reactor Development Co. v. Int'l Union of Electrical, Radio and Machine Workers, 367 U.S. 396 (1961) | 43, 45 |
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LEGISLATIVE HISTORY

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| 81 Cong. Rec. (1937) | |
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| 125 Cong. Rec. | |
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| H10678 (daily ed. Nov. 17, 1980) | 30 |
| H10679 (daily ed. Nov. 17, 1980) | 30 |
| S14690 (daily ed. Nov. 19, 1980) | 3, 30 |
| S14693 (daily ed. Nov. 19, 1980) | 30 |
| S14694 (daily ed. Nov. 19, 1980) | 30 |
| <i>Columbia River Navigation: Hearings on H.R.</i> <i>4948 Before House Comm. on Rivers and</i> <i>Harbors, 75th Cong., 1st Sess. (1937)</i> | 6 |
| H.R. 9020, 95th Cong., 1st Sess. (1977) | 25, 37 |
| H.R. Rep. No. 976, Pt. I, 96th Cong., 2d Sess. (1980) . . . | 2, 3, 4, 7, 13, 29, 34, 36, 37 |
| H.R. Rep. No. 976, Pt. II, 96th Cong., 2d Sess. (1980) . . . | 2, 4, 7, 13, 24, 29, 34, 37, 40 |

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|---|-----------------------|
| <i>Marketing Area of Bonneville Power Administration: Hearings on S. 1007, H.R. 994, H.R. 1160, H.R. 4071, and H.R. 4485 Before Subcomm. on Irrigation and Reclamation of the House Comm. on Interior and Insular Affairs, 88th Cong., 1st Sess. (1963)</i> | 14 |
| <i>National Resources Policy: Hearing Before the Senate Comm. on Interior and Insular Affairs, 81st Cong., 1st Sess. (1949)</i> | 11 |
| <i>Pacific Northwest Electric Power Issues: Hearings on H.R. 13931 Before the Subcomm. of Energy and Power of the House Comm. on Interstate and Foreign Commerce, 95th Cong., 2d Sess. (1978)</i> . . . | 33 |
| <i>Pacific Northwest Electric Power Planning and Conservation Act: Hearings on S. 885 Before the Senate Comm. on Energy and Natural Resources, 96th Cong., 1st Sess. (1979)</i> | 30 |
| <i>Pacific Northwest Electric Power Planning: Hearings on H.R. 3508 and H.R. 4159 Before the Subcomm. on Energy and Power of the House Comm. on Interstate and Foreign Commerce, 96th Cong., 1st Sess. (1979)</i> | 28, 29, 30, 41 |
| <i>Pacific Northwest Electric Power Supply and Conservation Act: Hearings on S. 2080 and S. 3418 Before the Senate Comm. on Energy and Natural Resources, 95th Cong., 2d Sess. (1978)</i> | 25, 26 |
| <i>Pacific Northwest Electric Power Supply and Conservation: Hearings on H.R. 9020, 9664 and 5862 Before the Subcomm. on Water and Power Resources of the House Comm. on Interior and Insular Affairs, Pt. V, 95th Cong., 1st Sess. (1977)</i> . | 25 |
| S. 885, 96th Cong., 1st Sess. (1979) | 26, 27, 28, 29 |
| S. 2080, 95th Cong., 1st Sess. (1977) | 25 |
| S. Rep. No. 272, 96th Cong., 1st Sess. (1979) | 26, 27, 38, 39, 40 |

ADMINISTRATIVE MATERIALS

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| BPA, <i>1948 Report on the Columbia River Power System</i> (1948) | 11, 12 |
| BPA, <i>1951 Advance Program for Defense</i> (1951) | 12 |
| BPA, <i>1970 Annual Report</i> (1970) | 22 |
| BPA, <i>1971 Annual Report</i> (1971) | 22 |
| BPA, <i>1982 Program and Financial Summary</i> (1982) .. | 18 |
| BPA, <i>1983 Final Rate Proposal, Wholesale Power Rate Design Study</i> (Sept. 1983) | 4 |
| BPA, <i>Administrator's Record of Decision, 1981 Transmission Rate Proposal and 1981 Wholesale Power Rate Proposal</i> (June, 1981) | 31 |
| BPA, <i>Draft Environmental Impact Statement, The Role of the Bonneville Power Administration in the Pacific Northwest Power Supply System</i> (1977) ... | 8, 11, 13, 21, 24, 27 |
| BPA, <i>Final Environmental Impact Statement, The Role of the Bonneville Power Administration in the Pacific Northwest Power Supply System</i> (1980) ... | 8, 10, 11, 12, 13, 14, 21, 22, 26, 27, 28 |
| Department of Energy, BPA, <i>Contract Official Records</i> (1981) | |
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| <i>Second Annual Report of the Administrator of the BPA Power Administration</i> , H. Doc. 612, 76th Cong., 3d Sess. (1940) | 8 |
| <i>Regional Solicitor's Opinion</i> , March, 5, 1956 | 11 |
| Solicitor, Department of the Interior, <i>History of the Preference Clause</i> (1958) | 5 |
| 22 Fed. Reg. 9196 (1957) | 2 |
| 48 Fed. Reg. 33518, 33521 (1983) | 10 |
| 48 Fed. Reg. 38533 (1983) | 10 |

ARTICLES AND TREATISES

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|---|-----------|
| Blumm, <i>The Northwest's Hydroelectric Heritage: Prologue to the Pacific Northwest Electric Power Planning and Conservation Act</i> , 58 Wash. L. Rev. 175 (1983) | 2, 7 |
| Farris, <i>The Economic Significance of the Preference Clause in Public Water Policy on the Development of the Pacific Northwest</i> , Unpublished (Ph.d. Dissertation) (1957), Univ. Microfilms, Ann Arbor, Mich. | 5 |
| Fereday, <i>The Meaning of the Preference Clause in Hydroelectric Power Allocation Under the Federal Reclamation Statutes</i> , 9 Env't'l L. 601 (1979) . . | 5 |
| Finklea, <i>Bonneville Power Administration Rate-making: An Analysis of Substantive Standards and Procedural Requirements</i> , 13 Env't'l L. 929 (1983) | 4, 12, 14 |
| Mentor, et al., <i>The Preference Clause Revisited: Central Lincoln Peoples' Utility District v. Johnson and the Pacific Northwest Electric Power Planning and Conservation Act</i> , 58 Wash. L. Rev. 413 (1983) | 9 |
| Redman, <i>Nonfirm Energy and BPA's Industrial Customers</i> , 58 Wash. L. Rev. 279 (1983) | 12 |
| Redman, <i>Preference and Other Clauses in Federal Power Marketing Acts</i> , 13 Env't'l L. 773 (1983) | 5 |
| Redman, <i>The Dance of Legislation</i> (1973) | 37 |
| W. Rodgers, <i>Corporate Country</i> (1973) | 14 |
| White, <i>The Right to Federally Generated Power</i> , American Public Power Association (1979) | 5 |

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**In the Supreme Court
of the United States**

OCTOBER TERM, 1983

ALUMINUM COMPANY OF AMERICA, et al.,
Petitioners,

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CENTRAL LINCOLN PEOPLES' UTILITY DISTRICT, et al.
Respondents,

and

PETER JOHNSON, as Administrator of the BONNEVILLE POWER
ADMINISTRATION, Department of Energy, and
DONALD PAUL HODEL, as Secretary of the DEPARTMENT OF
ENERGY, and the UNITED STATES OF AMERICA,
Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENTS
CENTRAL LINCOLN PEOPLES' UTILITY DISTRICT, et al.

INTRODUCTION

Petitioners' and federal respondents' statements of the case are inconsistent with the public position of the Bonneville Power Administration (BPA) prior to this litigation. Both statements omit material facts, including the disagreement between the petitioners and BPA over the extent of petitioners' "right" to nonfirm energy. Also, petitioners' statement of the case offers an inaccurate portrayal of federal power operations and sales in the Pacific Northwest and of the origin and content of the Pacific Northwest Electric Power Planning and Conservation Act (Regional Act). Therefore, these publicly-owned utility respondents present a statement of the case.

STATEMENT OF THE CASE

I. The Regional Act and Its Background

In 1937 Congress created BPA to market electric power to be produced at the Bonneville project on the Columbia River. In section 4(a) of the legislation, Congress mandated that BPA allocate this power according to a specific priority:

In order to insure that the facilities for the generation of electric energy at the Bonneville project shall be operated for the benefit of the general public, and particularly of domestic and rural consumers, *the administrator shall at all times, in disposing of electric energy generated at said project, give preference and priority to public bodies and cooperatives.*¹

Congress later gave the Secretary of the Interior authority to market public power generated from federal dams constructed under the Reclamation Act of 1939² and

¹16 U.S.C. §832c(a) (1976). [Emphasis added] Petitioners discuss preference under the Bonneville Project Act but omit this controlling section. See Pet. Br. 3, 13-14.

the Flood Control Act of 1944.³ The Secretary of the Interior delegated this authority to BPA for dams in the Pacific Northwest.⁴ In these two statutes Congress mandated that preference in the allocation of all public power be given to publicly-owned utilities.⁵ All three statutes permitted BPA to sell to privately-owned companies electric power in excess of the full requirements of the publicly-owned utilities.⁶

For nearly forty years BPA had sufficient power to meet the requirements of the publicly-owned utilities it was created to serve. In 1976, however, BPA informed the publicly-owned utilities that it would no longer be able to meet their full requirements.⁷ Earlier, applying its statutory mandate for priority to these utilities, BPA had notified its other customers, the privately-owned utilities and the specially-served industries, that it could not renew their contracts.⁸ For BPA to continue to meet its

²Act of August 4, 1939, 53 Stat. 1187-98, 43 U.S.C. §§485-85k (1979).

³Act of December 22, 1944, Pub. L. No. 78-534, 58 Stat. 887-907 (codified in scattered sections of titles 16, 33 and 43 U.S.C.).

⁴*E.g.*, 22 Fed. Reg. 9196 (1957) (ten reclamation dams and three flood control dams). Later, Congress designated BPA as the marketing agent for all federal power generated in the Pacific Northwest. 16 U.S.C. §838f (Supp. III 1979).

⁵See 43 U.S.C. §485h(c); 16 U.S.C. §825s.

⁶See 16 U.S.C. §832d(b); 43 U.S.C. §485h(c); 16 U.S.C. §825s.

⁷This "notice of insufficiency" prompted the consideration of regional legislation. Blumm, *The Northwest's Hydroelectric Heritage: Prologue to the Pacific Northwest Electric Power Planning and Conservation Act*, 58 Wash. L. Rev. 175, 228 (1983). BPA could not meet the power needs of the publicly-owned utilities because its power supplies were insufficient and sites for new hydroelectric generating facilities were not available. See H.R. Rep. No. 976, Pt. II, 96th Cong., 2d Sess. 27-30 (1980); H.R. Rep. No. 976, Pt. I, 96th Cong., 2d Sess. 24-25 (1980).

⁸H.R. Rep. No. 976, Pt. II, 96th Cong., 2d Sess. 29-30 (1980); H.R. Rep. No. 976, Pt. I, 96th Cong., 2d Sess. 24-25 (1980). BPA advised Congress that it was "legally precluded" from signing new contracts with the privately-owned utilities and specially-served industries. H.R. Rep. No. 976, Pt. I, 96th Cong., 2d Sess. 37 (1980).

customers' needs, it required authority from Congress to acquire new power resources.

Congress recognized that such legislation could not be enacted without a consensus among all BPA customers. The regional consensus could be obtained only if:

- (1) the DSI's are able to trade in their existing low-cost power contracts for new contracts at higher rates; (2) the low-cost power released by the DSI's can be made available to residential and small farm customers of regional IOU's; and (3) the preference rights of publicly-owned and cooperative utility systems can be preserved.

H.R. Rep. No. 976, Pt. I, 96th Cong., 2d Sess. 36 (1980); *see also id.* 27.

In 1980, Congress gave BPA the authority to acquire additional generating resources in the Regional Act. 16 U.S.C. §839d (Supp. V 1981). This new authority allowed BPA to meet the needs of the publicly-owned utilities and to preserve their priority entitlement to all BPA power sales, while continuing service to the specially-served industries and providing rate relief to the privately-owned utilities. The necessary consensus had been achieved:

The bill avoids the administrative reallocation problem by authorizing BPA to add to its power supply so that it can meet the needs of all its customer classes. The bill does so under power supply and rate provisions that are acceptable to all classes of BPA customers, and that fully protect the preference rights of public bodies and cooperatives.⁹

The Regional Act is a complex statute, but it contains a straightforward scheme for allocation of the federal power supply. Sections 5(a) and 10(c) are all-inclusive provisions that maintain the publicly-owned utilities' priority to all BPA power sales. 16 U.S.C. §§839c(a),

⁹126 Cong. Rec. H9850 (daily ed. Sept. 29, 1980) (Rep. Swift); *see also id.* S14690 (daily ed. Nov. 19) (Sen. Jackson); *id.* H10677 (daily ed. Nov. 17) (Rep. Duncan); *id.* H10524 (daily ed. Nov. 12) (Rep. Swift and Rep. Duncan); *id.* H9843 (daily ed. Sept. 29) (Rep. Ullman); *id.* H9845 (Rep. Lujan); *id.* H9849 (Rep. Moorhead).

839g(c). Section 5(b) creates a further obligation for BPA to meet the net firm load requirements of the publicly and privately-owned utilities. 16 U.S.C. §839c(b). Section 5(c) allows chiefly the privately-owned utilities to exchange with BPA higher cost power produced by their own generating facilities for an equivalent amount of lower cost federal power.¹⁰ Section 5 (d) provides that the specially-served industries receive long-term contracts for an amount of power equivalent to that to which they were entitled under their pre-Regional Act contracts. 16 U.S.C. §839c(d).

BPA, however, could not legally enter the contracts required by section 5 because it did not have sufficient power resources. Therefore, Congress created a legal fiction by "deeming" that BPA had sufficient power resources to support the contracts.¹¹

II. Publicly-Owned Utilities' Preference and Priority to Federal Power

Since 1906, our national policy has provided that publicly-owned utilities have preference over private

¹⁰16 U.S.C. §839c(c). In practice no transfer of power takes place; this exchange is merely a paper transaction which provides a subsidy to the customers of the privately-owned utilities. Finklea, *Bonneville Power Administration Ratemaking: An Analysis of Substantive Standards and Procedural Requirements*, 13 *Env't'l L.* 929, 944 (1983) (hereafter, Finklea). BPA indicates that it is to recover the costs of this exchange by charging higher prices to the specially-served industries. Fed. Br. 7-8; see also Pet. Br. 18; H.R. Rep. No. 976, Pt. II, 96th Cong., 2d Sess. 35 (1980). BPA, however, has interpreted the Regional Act to require that the publicly-owned utilities pay over \$250,000,000 of the total exchange costs for the 1984 rate year. BPA 1983 *Final Rate Proposal, Wholesale Power Rate Design Study*, tables 12 and 17 (Sept. 1983).

¹¹16 U.S.C. §839c(g)(7). Petitioners grossly distort the meaning of that section by inserting bracketed material into a quotation from legislative history. See Pet. Br. 16 n. 39. Petitioners' bracketed insertion is inappropriate and apparently intended to show that the section overrides preference and priority. The legislative history, however, immediately after the phrase quoted by petitioners states: "This provision does not override any other provision of this bill." H.R. Rep. No. 976, Pt. I, 96th Cong., 2d Sess. 64 (1980).

entities in the sale of public power generated at federally-owned hydroelectric dams.¹² Preference clauses provide the controlling mandate to agencies marketing federally-produced power.¹³ Through preference clauses Congress intended publicly-owned utilities "whenever possible, to benefit from the sale of low-cost federal power,"¹⁴ and intended "to provide low-cost power to the greatest number of consumers."¹⁵

Congress designed the preference and priority requirements of the Bonneville Project Act in response to industry's monopolization of the power produced at the Niagara hydroelectric project.¹⁶ The Bonneville Project

¹²See generally White, *The Right to Federally Generated Power*, American Public Power Association (1979); Fereday, *The Meaning of the Preference Clause in Hydroelectric Power Allocation Under the Federal Reclamation Statutes*, 9 *Env't'l L.* 601 (1979); Solicitor, Department of the Interior, *History of the Preference Clause* (1958).

¹³Petitioners, however, have created a law review article that relegates preference and priority to a congressional afterthought in the Regional Act and numerous other power marketing statutes. See Pet. Br. 15 n. 33, citing Redman, *Preference and Other Clauses in Federal Power Marketing Acts*, 13 *Env't'l L.* 773 (1983). The perceived necessity to write a law review article concerning a main aspect of this case and criticizing the Ninth Circuit's decision while litigation is pending demonstrates the weakness of the petitioners' arguments. The Court should ignore this heavyhanded attempt by petitioners to create support for their position. The simple answer to the article is that preference is the prime statutory allocation in most federal power marketing statutes, not a congressional suggestion to be followed or not as administrative discretion dictates. See sources cited in note 12 *supra* and Farris, *The Economic Significance of the Preference Clause in Public Water Policy on the Development of the Pacific Northwest* 28-83, (unpublished Ph.D. Dissertation) (1957), Univ. Microfilms, Ann Arbor, Mich.

¹⁴*City of Santa Clara v. Andrus*, 572 F.2d 660, 671 (9th Cir.) cert. denied sub nom. *Pacific Gas & Electric Co. v. City of Santa Clara*, 439 U.S. 859 (1978).

¹⁵*Central Lincoln Peoples' Utility District v. Johnson*, 686 F.2d 708, 714 (9th Cir. 1982).

¹⁶81 Cong. Rec. 7524, 7540-41 (1937) (Rep. Rankin); *id.* 7606-13. For example, at the Niagara Falls hydroelectric project, the Aluminum Company of America and associated electroprocessing companies consumed at bargain rates up to 90 percent of the power produced. *Id.* 7608-09. The rate paid by the electroprocessing industries in 1935 was

Act contains significant preference provisions in addition to the controlling provision quoted earlier.¹⁷ All of these provisions emphasize the national policy of giving publicly-owned utilities priority to federal power.

Congress preserved all of these preference and priority provisions in the Regional Act without qualification or limitation: Section 5(a) of the Act, 16 U.S.C. §839c(a), provides:

All power sales under this Act shall be subject at all times to the preference and priority provisions of the Bonneville Project Act of 1937 (16 U.S.C. 832 and following) and, in particular, sections 4 and 5 thereof.

Congress also protected the preference provisions of other federal laws applicable to BPA power sales. Section 10(c) of the Act, 16 U.S.C. §839g(c), provides:

Nothing in this Act shall alter, diminish, abridge, or otherwise affect the provisions of other Federal laws by which public bodies and cooperatives are entitled to preference and priority in the sale of federally generated electric power.

Earlier versions of this legislation were not as clear. Congress added forceful language to the Regional Act because of concerns that ambiguous language in earlier versions might permit someone to later assert that

1.3 mills per kilowatt-hour while the average price of power from the project was 3.1 mills per kilowatt-hour. There was little power for public consumption and the power rates paid by most residential consumers were many times that of the industries. The Niagara disaster threatened to reoccur at Bonneville. *Id.* 7609 (Rep. Smith); see *Columbia River Navigation: Hearings on H.R. 4948 Before House Comm. on Rivers and Harbors*, 75th Cong., 1st Sess. 180-95 (1937) (Rep. Pierce). Thus, Congress designed the Bonneville Project Act to prevent the monopolization of power by "limited groups." 16 U.S.C. §832a(b).

¹⁷The preference provisions of the Act reserve fifty percent of BPA's capacity for future public acquisition, 16 U.S.C. §832c(b) [section 4(b)]; require five-year "callback" provisions on any contracts to private utilities, 16 U.S.C. §832d(a) [section 5(a)]; and provide a reasonable time for any publicly-owned utility to become a qualified purchaser, 16 U.S.C. §832c(d) [section 4(d)], or to secure financing, 16 U.S.C. §832c(c) [section 4(c)].

preference and priority applied only to uncommitted power,¹⁸ the assertion made by the petitioners and BPA in their statements of the case. See Fed. Br. 7, 10; Pet. Br. 5, 18. Congress added sections 5(a) and 10(c) to preclude that argument and to make its intent as to preference clear.¹⁹

III. Publicly-Owned Utilities' Service to Pacific Northwest Consumers

These twelve publicly-owned utility respondents include utilities with and without their own generating facilities and range from the largest publicly-owned utility in the Northwest, Seattle City Light, to one of the smallest, Northern Wasco County Peoples' Utility District.²⁰ They

¹⁸See the statement by a representative of the American Public Power Association at pp. 25-26 *infra*.

¹⁹Representative Swift, the sponsor of the bill that became the Regional Act, stated:

The bill does not violate the preference clause: The bill has been heavily amended to insure full protection of the traditional preference rights of public bodies and cooperatives. The Public Power Council, the National Rural Electric Cooperative Association, and the American Public Power Association are in full agreement that the bill in its present form protects preference.

126 Cong. Rec. H9851 (daily ed. Sept. 29, 1980); see also H.R. Rep. No. 976, Pt. II, 96th Cong., 2d Sess. 46 (1980); H.R. Rep. No. 976, Pt. I, 96th Cong., 2d Sess. 34, 59 (1980).

²⁰There are 116 publicly-owned preference utility customers of BPA. They purchase nearly 60 percent of BPA's firm power. They do not operate for profit and sell power to their customers at the lowest possible cost. See 16 U.S.C. §832d(a). They range in size from large municipal utilities serving residential, commercial and industrial needs of metropolitan areas to small rural cooperatives serving farms and farming communities. Many of the publicly-owned utilities purchase all of their power from BPA. Some of them own generating facilities that serve a part of their load and purchase additional priority power from BPA. See H.R. Rep. No. 976, Pt. II, 96th Cong., 2d Sess. 27 (1980); BPA, *Draft Environmental Impact Statement, The Role of the Bonneville Power Administration in the Pacific Northwest Power Supply System* (hereafter, *Draft EIS*), Appendix C, at I-13 to I-15 (1977). In contrast those of BPA's specially-served industrial customers that are aluminum companies purchase over 30 percent of BPA's power and employ about one-half of one percent of the region's work force. Blumm, *The Northwest's Hydroelectric Heritage: Prologue to the Pacific Northwest Electric Power Planning and Conservation Act*, 58 Wash. L. Rev. 175, 179 (1983).

together serve over 560,000 residential customers, 60,000 commercial customers and 2,000 industrial customers.²¹

BPA sells power to the publicly-owned utilities under two different labels — "firm" and "nonfirm."²² Publicly-owned utilities have had a statutory right as well as a contractual right to BPA nonfirm power for nearly forty years.²³

Publicly-owned utilities with their own generating facilities use BPA nonfirm energy primarily to continue to serve their customers when the generating facilities are unable to produce sufficient power. This inability occurs when equipment breaks down or water levels at their own reservoirs are depleted. See J.A. 50-51, 116-17; Affidavit of Gerald R. Garman 5 (filed Aug. 31, 1981); Affidavit of Lawrence A. Dean 10 (filed Sept. 9, 1981).

²¹See *Draft EIS*, note 20 *supra*, Appendix C, Attachment B, at B-8 to B-13.

²²*Central Lincoln Peoples' Utility District v. Johnson*, 686 F.2d 708, 710 (9th Cir. 1982); BPA, *Final Environmental Impact Statement, The Role of the Bonneville Power Administration in the Pacific Northwest Power Supply System* (hereafter, *Final EIS*) at IV-69 to IV-70 (1980). Firm power is the amount of power which BPA, relying primarily on a hydroelectric generating system, can deliver even in the driest or "critical" years. In most years, BPA reservoirs have more water from rain and snowmelt than in a critical year, and BPA can generate additional power. BPA labels this additional power nonfirm.

²³Petitioners state, without a factual basis, that BPA has never had a contractual obligation to supply publicly-owned utilities with nonfirm energy. P.B. 12-13. Since the late 1930's publicly-owned utilities have had a contractual right to purchase nonfirm energy and BPA has had an obligation to sell nonfirm energy to them when it is available. See *Second Annual Report of the Administrator of the Bonneville Power Administration*, H. Doc. 612, 76th Cong., 3d Sess. 8 (1940); Witness Statement of Gerald R. Garman 3 (filed Sept. 11, 1981); Preference Customer Memorandum (9th Cir.) 11; Preference Customer Reply Memorandum (9th Cir.) 24. The City of McMinnville signed one of the first nonfirm energy contracts with BPA in 1940. *Second Annual Report of the Administrator of the BPA Power Administration*, H. Doc. 612, 76th Cong., 3d Sess. 8 (1940). McMinnville owned a hydroelectric plant and a diesel generating plant for which it could use the nonfirm energy for backup and displacement. *Id.*

Publicly-owned utilities also use nonfirm energy to continue service to their customers when it is necessary to shut down generating facilities or reduce levels of generation for maintenance. Finally, these publicly-owned utilities occasionally shut down an expensive thermal facility and replace that power with nonfirm energy purchased from BPA.²⁴ These limited purchases enable the utilities to reduce costs to their customers to the lowest possible level and to follow national energy policy.²⁵

Both generating and nongenerating publicly-owned utilities make other uses of BPA nonfirm energy. BPA now sells nonfirm energy to publicly-owned utilities for sale to farmers for use in irrigation of farmland that

²⁴Four of these publicly-owned utility respondents own thermal generating facilities — City of Eugene, Eugene Water and Electric Board, 51 megawatts of cogeneration; City of Seattle, City Light Department, 750 kilowatts of combustion turbine, 30 megawatts of steam generation and 112 megawatts of the Centralia coal project; City of Tacoma, Department of Public Utilities, 112 megawatts of the Centralia coal project; and Public Utility District No. 1 of Snohomish County, 112 megawatts of the Centralia coal project. See Mentor, et al., *The Preference Clause Revisited: Central Lincoln Peoples' Utility District v. Johnson and the Pacific Northwest Electric Power Planning and Conservation Act*, 58 Wash. L. Rev. 413, 429 n. 124 (1983).

²⁵See 16 U.S.C. §2601 (Supp. III 1979); 42 U.S.C. §8301 (Supp. V 1981). Petitioners ignore the record before the Ninth Circuit regarding the uses of nonfirm energy by publicly-owned utilities and assert, without a factual basis, that publicly-owned utilities purchase nonfirm energy from BPA "for resale to entities other than their own retail customers." Pet. Br. 6; see also *id.* 12-13. Petitioners made the same argument to the Ninth Circuit. The Ninth Circuit concluded: "The present case is not one in which a preference customer profits from selling power acquired through the preference to the industries who also want the power. Here, the preference customers want the low-cost power for their customers." 686 F.2d at 715 n. 9. These publicly-owned utilities have always purchased nonfirm energy for service to *their own customers*. Their BPA contracts prohibit the resale of any nonfirm energy purchased from BPA. See BPA, IX Contract Official Records (hereafter, COR) 2454 [§60] (1980).

otherwise would be barren.²⁶ Publicly-owned utilities also supply BPA nonfirm energy to industries for use in place of fossil fuels.²⁷

IV. BPA's Historical Nonfirm Energy Sales

Prior to the Regional Act, BPA generally sold firm power through multi-year commitments. BPA sold nonfirm energy, if available, only on an hourly basis. *Final EIS*, note 22 *supra*, at IV-71; Affidavit of Lawrence A. Dean 7-8 (filed Sept. 9, 1981); see 48 Fed. Reg. 33518, 33521 (1983).

Each hour, BPA determined how much nonfirm energy it had available for sale. No BPA customer could rely on the continued availability of nonfirm energy. Any sales by BPA of nonfirm energy could be stopped, at any time, if BPA needed the energy to meet its firm load requirements. This was the mechanism by which nonfirm sales provided "reserves" for BPA's firm power customers. See *Port of Astoria v. Hodel*, 595 F.2d 467, 471 (9th Cir. 1979). All purchasers of nonfirm energy potentially provided these reserves.²⁸

²⁶48 Fed. Reg. 38533 (1983). The cost of electricity which BPA sells to publicly-owned utilities has increased dramatically. Since 1979 the publicly-owned utility rate from BPA has increased approximately 300 percent. *The Oregonian*, Oct. 1, 1983, at 1, col. 1. Such an increase prevents many areas of Eastern Oregon and Eastern Washington from being used as productive farm land because electricity rates are a critical factor in the economics of irrigation farming.

²⁷48 Fed. Reg. 33518 (1983). This use comports with national energy policy. The industries include Boeing Commercial Airplane Co., Weyerhaeuser, and Longview Fibre.

²⁸Contrary to BPA's assertion, recognition of the priority to publicly-owned utilities for nonfirm energy will not require acquisition by BPA of "additional generation capacity." See Fed. Br. 19. Sales of nonfirm energy to any customer can be interrupted and therefore, provide reserves.

Before selling nonfirm energy to any customer, BPA first used nonfirm energy to serve any firm loads for which there was insufficient firm energy available and to fill federal reservoirs in order to maintain its firm power capabilities. BPA then sold nonfirm energy to publicly-owned utilities as required by federal law.²⁹ If there was additional nonfirm energy available, BPA split it equally between the privately-owned utilities and the "first quartile" (one quarter) load of the specially-served industries. Finally, BPA sold any remaining nonfirm energy as "surplus"³⁰ energy to utilities outside the Pacific Northwest.³¹

The specially-served industries first began to purchase nonfirm energy in 1948. BPA began to sell nonfirm energy to the industries because there was not sufficient firm power available to sell to all potential purchasers and the industries were not priority purchasers.³² Contrary to

²⁹See Regional Solicitor's Opinion, March 5, 1956, at 1; *Draft EIS*, note 20 *supra*, Appendix C, at III-29; *Final EIS*, note 22 *supra*, at IV-68, IV-70, and Attachment B at B-34 to B-35.

³⁰Petitioners attempt to obscure the issues by stating that the publicly-owned utilities purchased "surplus" power before the Regional Act. See Pet. Br. 6, 12-13. The petitioners, through sophistry, equate the surplus power in section 5(f) of the Regional Act, 16 U.S.C. §839c(f), with the nonfirm energy purchased by public bodies before the Regional Act. Prior to the Regional Act, BPA did not sell surplus power to any customer in the Pacific Northwest; surplus power was a term of art meaning power surplus to the needs of the Pacific Northwest. See also 16 U.S.C. §837(c), (d).

³¹*Final EIS*, note 22 *supra*, at IV-70. As an example of the relative amounts of nonfirm energy sold by BPA to its customer groups, during fiscal year 1978 BPA sold approximately 250 million kilowatt hours to preference customers, 4,544 million kilowatt hours to the specially-served industries, 8,616 million kilowatt hours to the privately-owned utilities, and 6,246 million kilowatt hours outside the Pacific Northwest Region as surplus. *Id.*, at IV-69, table IV-8.

³²*National Resources Policy: Hearings Before the Senate Committee on Interior and Insular Affairs*, 81st Cong., 1st Sess. 234 (1949) (Statement by BPA Administrator); BPA, *1948 Report on the Columbia River Power System* 26 (1948). At the same time, BPA indicated that because of a lack of sufficient firm power, any future sales to the specially-served

BPA's assertion, BPA did not begin the sales because they resulted in an "operational benefit" by providing reserves for other customers. See Fed. Br. 3.

Prior to the Act, the industries purchased nonfirm energy from BPA to serve their first quartile load, which was approximately 1,000 megawatts. There were three other sources of service for the first quartile load: (1) **Advance** — in the fall BPA provided "advance" energy by drawing down its reservoirs on the assumption that there would be sufficient snow and rain to refill them later in the year. Service could be halted later if the reservoirs do not refill. (2) **Shift** — BPA in planning the operation of the federal dams over a multi-year period shifted into the present year water which would ordinarily be saved in the reservoirs for use in later years. Service could be halted later if the reservoirs do not refill. (3) **Purchase** — BPA acted as a trust agent and purchased energy for the industries if they could not be served with federal power. *Final EIS*, note 22 *supra*, at IV-80, IV-84; Finklea, note 10 *supra*, 950-51.

For the five years prior to the Regional Act, pursuant to the industries' pre-Regional Act contracts, BPA

industries for new loads would not be supplied on a firm basis, but would be served with nonfirm energy if available. BPA, *1948 Report on the Columbia River Power System* 26 (1948); see also BPA, *1961 Advance Program for Defense* 26 (1951).

BPA had no obligation to supply the load growth of the specially-served industries or even to attempt to supply the load growth. Congress created BPA to sell federal power from the Bonneville project to publicly-owned utilities. Petitioners, however, have created a second law review article to reverse this congressional decision and show how sales of nonfirm energy to the industries instead of other customers improves operating efficiencies for BPA. See Pet. Br. 9 n. 16 citing Redman, *Nonfirm Energy and BPA's Industrial Customers*, 58 Wash. L. Rev. 279 (1983). Again, the preceived need to create resource material to cite to the Court demonstrates the weakness of petitioners' arguments. The erroneous premise of the article is that BPA was obligated under the Bonneville Project Act to provide firm power for any and all loads the specially-served industries brought to the Pacific Northwest. An erroneous conclusion of the article is that sales of nonfirm energy to the specially-served industries' top quartile load are more efficient operationally than sales of nonfirm energy to any other BPA customer. See p. 10 *supra*; see also *Final EIS*, note 22 *supra*, Attachment B, at B-28 [comment no. 31].

provided federal power to the industries through a combination of advance, shift and nonfirm energy so that an average of 91.75 percent of the industries' total load was served.³³ During that same period BPA made trust agency purchases, that were not provided for in the contracts, so that the industries' first quartile load could be fully served. In that way, 100 percent of the total industry load was served. Affidavit of Bruce E. Mizer 22 (filed Sept. 11, 1981).

The Regional Act tied the specially-served industries' entitlement to federal power to their pre-Regional Act contracts. 16 U.S.C. §839c(d)(1)(B). The Regional Act continued BPA's authority to make purchases for the industries to serve their first quartile load. 16 U.S.C. §849f(i)(1); see H.R. Rep. No. 976, Pt. II, 96th Cong., 2d Sess. 56 (1980).

Before the Regional Act, service of nonfirm energy for the first quartile load of the industries provided reserves to protect BPA's firm loads.³⁴ The Regional Act requires that service to the industries' first quartile load continue to provide reserves to protect BPA's firm loads. 16 U.S.C. §839c(d)(1) (A); H.R. Rep. No. 976, Pt. II, 96th Cong., 2d Sess. 34 (1980).

Petitioners assert that their purchase of nonfirm

³³J.A. 36 (67 percent service to the first quartile load plus full service to the other three quartiles equals 91.75 percent service for the total load); See also H.R. Rep. No. 976, Pt. I, 96th Cong., 2d Sess. 62 (1980) ("During a 3½ year period (January, 1975 through June, 1978) BPA withheld almost 9 billion kilowatt hours of energy, which is equal to about 9 percent of the total planned DSI load for that period."). The specially-served industries contracts prior to the Regional Act were designed to provide power at a minimum of 85 percent of the time. *Draft EIS*, note 20 *supra*, Appendix A at II-46.

³⁴*Port of Astoria v. Hodel*, 595 F.2d 467, 472 (9th Cir. 1979); *Final EIS*, note 22 *supra*, at IV-80. Petitioners assert, without citation, that prior to the Regional Act, service of nonfirm energy to the industries' first quartile load additionally provided a reserve to the publicly-owned utilities' needs for nonfirm energy. Pet. Br. 6, 11. Petitioners' assertion is incorrect. See pp. 21-23 *infra*.

energy results in "reduced rates for all customers." Pet. Br. 3; *see also id.* 4. BPA has concluded, however, that such sales do not reduce the cost of power to BPA's other customers.¹⁵ Petitioners further assert that BPA has charged them a firm power rate for service of nonfirm energy. Pet. Br. 11. This assertion is incorrect and in fact, BPA often charges the industries less for nonfirm energy than the rate charged to publicly-owned customers.¹⁶

V. BPA's Changing Interpretations

BPA originally informed both Congress and the public that the new regional legislation would not change the longstanding statutory priority of publicly-owned utilities. At the final public hearing on the proposed legislation, the BPA Administrator told Congress that the legislation, without "ambiguity or misunderstanding," retained BPA's mandate to give preference in all sales to the publicly-owned utilities. *See* p. 28 *infra*. In its final EIS, published at the same time as the passage of the Regional Act, BPA stated that under the legislation preference "would be preserved intact"; BPA did not mention any reversal in the priority to nonfirm energy. *See* pp. 26-27 *infra*.

¹⁵*Final EIS*, note 22 *supra*, Attachment B, at B-29. BPA also concluded that it cost BPA "just as much, if not more" to serve the industries as it did to serve the publicly-owned utilities. *Id.*, at B-30.

¹⁶*See* J.A. 51-52. Also, in billing the industries, BPA melds the price for nonfirm energy used to serve the first quartile load with the price of the firm energy BPA is obligated to serve the other three quartiles. Finklea, note 10 *supra*, 951-52. As a result, all of the energy sold to the industries is sold at a single melded rate. Through this pricing system the specially-served industries obtain an advantage available to no other BPA customer. They can curtail service to their first quartile load without penalty, *see* J.A. 78, IX COR 2502 [§9(b)], and pay the lower melded rate for what is in actuality firm power service to the remaining three quartiles. The inequities in BPA's rate structures for the industries have been pointed out before. *Marketing Area of Bonneville Power Administration: Hearings on S. 1007, H.R. 994, H.R. 1160, H.R. 4071, and H.R. 4485 before Subcomm. on Irrigation and Reclamation of the House Comm. on Interior and Insular Affairs, 88th Cong., 1st Sess. 134 (1963); W. Rodgers, Corporate Country 163-64 (1973).*

After passage of the Regional Act, BPA reversed its position. At a meeting with the industries, a high-level BPA staff member said that the Act required a reversal in priority and that the specially-served industries had a priority to nonfirm energy.¹⁷ However, shortly thereafter, counsel for BPA stated that the Regional Act did not control the allocation of nonfirm energy, and that the BPA Administrator had the discretion to reverse the priorities to nonfirm energy. Preference Customer Memorandum (9th Cir.), App. A, 4 (quoting statement of BPA counsel).

During the contract negotiations required by the Regional Act, BPA treated the priority to nonfirm energy for the specially-served industries as a nonnegotiable fact that would be embodied in the contracts to be offered to the industries.¹⁸ A newly-appointed BPA Administrator then offered the contracts, stating that the Regional Act, by requiring in sections 5(d)(1)(A) and 3 (17) that the industries provide reserves, provided a "clear statutory basis" for the reversal in priority. J.A. 100. The Administrator described the increased service resulting from the reversal as "quasi-firm" service. *Id.*¹⁹

¹⁷1 COR 258. Other staff interpretations made during 1981 are set out in Appendix A to the Preference Customer Memorandum (9th Cir.).

¹⁸*E.g.*, XXII COR 6408. These publicly-owned utilities objected to BPA's actions. J.A. 114-17. Because the priority to nonfirm energy was nonnegotiable, petitioners' assertion that the contract negotiation process satisfies the federal requirements for a change in marketing policies is irrelevant. See Pet. Br. 18 n. 51, 50 n. 123.

¹⁹The Administrator also justified increased service to the industries by a reference which provided that the industries' historical service would continue: "[u]nder the Regional Act, the DSIs sought and achieved a significantly improved service: '... a quantity of power ... based on the proportion of total industrial requirement, on a long-term average (currently estimated to be between 85 and 96 percent of the total DSI load)'. J.A. 106. (ellipsis in original)

Petitioners believe that a priority to nonfirm energy means that the industries must be served "as if firm" ahead of all other needs for nonfirm energy.⁴⁰ BPA does not agree. In the contracts for the industrial purchasers, BPA provided that federal needs for nonfirm energy to displace federal resources must be met first before serving the industries. IX COR 2483 [§ 7(c)]. Petitioners and BPA have attempted to de-emphasize their dispute.⁴¹

VI. The Case Below

The publicly-owned utilities filed suit in the Ninth Circuit to require BPA to follow its statutory mandate for priority to nonfirm energy.⁴² The suit alleged that four sections in the contracts BPA offered the specially-served industries: (1) violated the publicly-owned utilities' recognized priority right to nonfirm energy; (2) exceeded the industries' entitlement to power established by the Regional Act; and (3) violated BPA power marketing procedures. All of the privately and publicly-owned utilities in the Northwest intervened and were aligned as plaintiffs.⁴³ The industries intervened as defendants.

⁴⁰XXV COR 6844-45; Brief for Respondents-Intervenors (9th Cir.) 43-44. Petitioners' logic could override nonpower uses of the Columbia River such as irrigation, recreation and fish protection. See Pet. Br. 40 n. 111.

⁴¹In the cover letter to its contract offer to the specially-served industries, BPA indicated that it would attempt to resolve the dispute at a later time. Petitioners supplied a copy of the letter in the Appendix to their Petition for Certiorari but omitted the paragraph discussing the dispute. See Pet. for Cert. App. M-1. The complete cover letter is reproduced as an Appendix to this brief.

⁴²The suit also challenged the manner in which BPA shifted water in the hydroelectric project reservoirs to increase service to the first quartile load. That issue was resolved by settlement.

⁴³This is not a dispute over nonfirm energy between publicly-owned and privately-owned utilities. Cf. *Alabama Power Co. v. FERC*, 685 F.2d 1311 (11th Cir. 1982), cert. denied _____ U.S. _____, 103s Ct. 3573 (1983) (dispute over whether there is preference to public bodies in relicensing of hydroelectric projects under the Federal Power Act).

Chief Judge Browning and Judges Boochever and Wallace held that the Regional Act in unambiguous language reaffirmed the publicly-owned utilities' clear and longstanding statutory preference to nonfirm power. 686 F.2d at 711-13. The court carefully considered BPA's proposed interpretation, but concluded that it was unreasonable because it was contrary to the Act's preservation of preference and priority and could not be harmonized with other provisions. *Id.*

The court noted that nowhere in the legislation did Congress state explicitly that it was changing the priority to nonfirm energy. 686 F.2d at 713. The court examined the legislative history relied upon by BPA and found it ambiguous, especially compared to the clear legislative history supporting no reversal in priority. 686 F.2d at 713-14. The court concluded that if Congress had intended to reverse priorities, it would have used explicit language, not inference. 686 F.2d at 713.

The specially-served industries and BPA petitioned for a rehearing en banc and changed the emphasis of their arguments to different provisions of the Act. The Ninth Circuit denied the petition, but responded to some of the arguments in a new footnote to its opinion. See 686 F.2d at 712 n.4. The court found that the industries' entitlement was tied to and limited by their prior contracts which did not give them priority to nonfirm energy.⁴

After the Ninth Circuit denied the petition for rehearing, BPA obtained a stay of the Ninth Circuit mandate by agreeing to operate its system so as to retain priority to nonfirm energy for the publicly-owned utilities in accordance with the opinion. BPA has maintained this

⁴"Because the Ninth Circuit invalidated the industry contracts on other grounds, the court concluded it was not necessary to determine whether BPA had violated its marketing policy procedures. 686 F.2d at 715 n. 10.

priority with no adverse impact on BPA revenues or operations.⁴⁵

BPA did not petition for certiorari.

SUMMARY OF ARGUMENT

For over forty years, BPA has contracted with publicly-owned utilities to sell them nonfirm energy. During this time, BPA always made sales of nonfirm energy first to publicly-owned utilities and then to other BPA customers.

As petitioners and BPA recognize, the Regional Act preserves this preference and priority in a simple and straightforward manner. Section 5(a) provides that all sales of power by BPA are subject to the priority for publicly-owned utilities created by the Bonneville Project Act. Section 10(c) preserves intact the preference granted to publicly-owned utilities by the two other federal acts applicable to BPA power sales.

Petitioners and BPA argue that Congress impliedly reversed this express and longstanding priority and placed the 1,000 megawatt first quartile load of the specially-served industries ahead of the publicly-owned utilities. They support their arguments with a complex, convoluted reading of the Regional Act and its legislative history.

Petitioners and BPA argue that section 5(a) does not apply to all BPA power sales but is limited to sales of uncommitted power and that section 10(c) applies only to federal power sales outside the Pacific Northwest. These arguments contradict the plain language of the Regional Act and its voluminous legislative history.

Petitioners and BPA also argue that the Act requires that the industries receive a greater amount of nonfirm

⁴⁵See BPA 1982 Program and Financial Summary 63 (1982).

energy. They argue that the Act by implication gives the industries a priority to nonfirm energy based on a provision that requires the industries to provide a portion of BPA's reserves for firm loads. They also argue that the Act decreased the reserves provided by nonfirm energy service to the first quartile load and by implication thereby increased the industries' entitlement. Their arguments ignore the facts and the language of the Act.

Requiring a customer to provide a reserve to BPA does not establish the amount of power BPA is to sell to the customer. Before a reserve is created, the customer must first be entitled to receive power. Only then does the curtailment of the right to be served create a reserve.

Petitioners and BPA are also incorrect because the Act limits the industries to an "amount of power equivalent" to that to which they were entitled before the Act. Further, Congress did not decrease the reserves provided by service to the industries' first quartile load, but intended that they be the same as before the Act.

Petitioners and BPA seek to limit longstanding preference and priority rights when the Act provides that nothing in the Act shall abridge or diminish such rights. They want an increased amount of power for the industries, when the Regional Act limits them to an equivalent amount of power.

ARGUMENT

I. THE REGIONAL ACT CONTINUES PREFERENCE AND PRIORITY TO FEDERAL POWER FOR PUBLICLY-OWNED UTILITIES

There is only one provision in the Regional Act, section 5(a), that applies to *all* BPA sales of power under the Act, 16 U.S.C. §839c(a). This section is all-encompassing, requiring that any BPA sale of power is subject at all times to the preference and priority provisions of the Bonneville Project Act.

The Regional Act in section 10(c) also expressly preserves the requirements of the Reclamation Act of 1939 and the Flood Control Act of 1944, that BPA give priority to publicly-owned utilities in the sale of nonfirm energy from federal hydroelectric projects. 16 U.S.C. § 839g(c). See pp. 1-2 *supra*.

The Ninth Circuit recognized these two preference directives and held that publicly-owned utilities have preference and priority to *all* nonfirm energy sold by BPA.

Petitioners and BPA attack that holding in three ways. First, they rewrite the history of BPA sales of nonfirm energy before the Act.⁴⁶ Petitioners and BPA argue that the industries had a first right to nonfirm energy under their pre-Regional Act contracts and that service of nonfirm energy to the publicly-owned utilities occurred only after a BPA interruption of the industries' right to service. Fed. Br. 26 n. 19; Pet. Br. 6, 12-13, 39. They fabricate this history in order to argue that the Regional Act decreased BPA's right to interrupt the industries and thereby granted the industries by implication a greater right to nonfirm energy.

Second, they argue that section 5(a) does not apply to *all* BPA power sales, but applies only through section 5(f) to any uncommitted power remaining after BPA makes sales of power under section 5(b), (c) and (d).⁴⁷ Third, they argue that the preservation of preference in section 10(c)

"The court found that it was "undisputed" that prior to the Regional Act the preference and priority mandate of the Bonneville Project Act applied to nonfirm energy and that BPA had followed that mandate since 1937. 686 F.2d at 711. The court also found that it was "undisputed" that, prior to the Act because of statutory preference, BPA allocated and sold nonfirm energy to the publicly-owned utilities prior to selling nonfirm energy to the industries. 686 F.2d at 712 n. 4.

"Fed. Br. 24-25; Pet. Br. 24. The BPA Administrator did not mention section 5(f) in his decision offering the contracts at issue in this case. See X COR 2640-2899. Nor did BPA make this argument in its brief on the merits to the Ninth Circuit.

does not apply to the Pacific Northwest but applies only to power marketing statutes for other regions of the country.⁴⁸

A. Before the Regional Act, BPA Allocated and Sold Nonfirm Energy First to Publicly-Owned Utilities

Petitioners and BPA recognize that if the publicly-owned utilities had preference to nonfirm energy before the Regional Act, the reaffirmation of preference in the Act ends their case. To counter the Ninth Circuit's decision, they would rewrite the history of BPA's sales of nonfirm energy before the Regional Act. For straightforward statutory preference they substitute an intricate but inaccurate argument based on BPA's right to interrupt the industries to provide reserves. Fed. Br. 26 n. 19; Pet. Br. 6, 12-13.

The historical record and BPA's own practices and statements prepared before this litigation refute this new argument. As the Ninth Circuit found, BPA always allocated and sold nonfirm energy to publicly-owned utilities before it allocated and sold nonfirm energy to the industries. See p. 20n. 46 *supra*.

In 1980 BPA published a final environmental impact statement (EIS), describing its role in the Pacific Northwest Power Supply System.⁴⁹ The EIS stated that

⁴⁸Fed. Br. 25-26; Pet. Br. 26 n. 31. BPA's argument based on section 10(c) is not in the Administrator's decision offering the contracts involved in this case, or in BPA's brief on the merits to the Ninth Circuit. See X COR 2640-2899.

⁴⁹Court orders in 1975 and 1977 directed BPA to prepare this EIS prior to any BPA involvement in then existing regional plans to build new electrical generating facilities and to market the power produced by those facilities. See, *Port of Astoria v. Hodel*, 8 E.R.C. (BNA) 1156 (D. Or. 1975), *aff'd*, 595 F.2d 467 (9th Cir. 1979); *Natural Resources Defense Council v. Hodel*, 435 F. Supp. 590 (D. Or. 1977), *aff'd sub nom. Natural Resources Defense Council v. Munro*, 626 F.2d 134 (9th Cir. 1980). BPA began the EIS in 1975, issued a draft EIS in 1977 and published a final EIS in December, 1980.

federal law required that BPA give "priority for federal power to public agencies and cooperatives within the region." *Final EIS*, note 22 *supra*, at IV-68.

BPA's priority in allocation was:

firm capacity and energy and nonfirm energy first to preference customers and federal agencies in the Pacific Northwest region,

remaining firm and nonfirm capacity and energy to direct-service industrial customers (DSIs) and Northwest investor-owned utilities

Id. at IV-68 to IV-69.

The EIS describes in detail how BPA sold nonfirm energy.¹⁰ On the occasions when BPA had insufficient nonfirm energy to serve all of its customers' needs, BPA strictly followed the allocation priorities reflected in the EIS. For example, in 1971 BPA curtailed all nonfirm energy sales on October 18 because there was no nonfirm energy. BPA, *1971 Annual Report* 17 (1971). On November 1, BPA began selling nonfirm energy to the publicly-owned utilities and later, on November 18, to the privately-owned utilities and specially-served industries. *Id.*; see also *Final EIS*, note 22 *supra*, Attachment B, at B-34 to B-35. Further, when BPA had only limited supplies of nonfirm energy, BPA curtailed sales to all other customers before it curtailed sales to publicly-owned utilities.¹¹

Before the Regional Act, BPA sold nonfirm power first to the publicly-owned utilities because preference required

¹⁰*Final EIS*, note 22 *supra* at IV-71 (J.A. 29). These respondents quoted that description verbatim in every brief filed with the Ninth Circuit. See Memorandum in Support of Motion for Temporary Injunction (9th Cir.) 27; Preference Customer Memorandum (9th Cir.) 15; Preference Customer Reply Memorandum (9th Cir.) 12; Preference Customers' Response to Petition for Rehearing (9th Cir.) 5-6. Petitioners and BPA never questioned the allocation priority.

¹¹BPA, *1970 Annual Report* 27 (1970). Under the petitioners' view of history, however, BPA must have interrupted the industries' right to purchase nonfirm energy, not only to serve publicly-owned utilities' needs, but also to serve privately-owned utility needs and even industry needs. In other words, service to the industries was interrupted to serve the industries.

it; the interruptible character of industry service was irrelevant to this priority.

B. The Regional Act Reaffirms Preference and Priority to Nonfirm Energy for Publicly-Owned Utilities

Passage of the Regional Act in 1980 did not change the priorities to nonfirm energy. The Act both reaffirms and reinforces the preference and priority provisions of existing laws. Sections 5(a) and 10(c) of the Act, could not be any clearer: *All* power sales are subject to the preference and priority provisions of the Bonneville Project Act. *Nothing* in the Act alters or diminishes the preference clauses in the other federal laws controlling BPA's marketing of power.

Petitioners and BPA, however, now argue that "all" means "some" and that section 5(a) applies only to sales of power made under 5(f) after all sales are made pursuant to section 5(b), (c) and (d). Fed. Br. 24-25; Pet. Br. 24. They now also argue that section 10(c) applies only to federal laws governing the marketing of power by federal agencies outside the Pacific Northwest. Fed. Br. 25-26; Pet. Br. 26 n.31.

The answer to these arguments is the plain language of the Act. If petitioners and BPA were correct, section 5(a) would read:

All power sales under this Act [EXCEPT FOR POWER SALES UNDER SECTION 5(b), (c) AND (d)] shall be subject at all times to the preference and priority provisions of the Bonneville Project Act of 1937 (16 U.S.C. 832 and following) and, in particular, sections 4 and 5 thereof.

16 U.S.C. §839c(a).

This reading of section 5(a) would make it redundant. Section 5(f) requires that power be marketed in accordance with the Bonneville Project Act, and thus ensures that preference and priority apply to sales of energy surplus to BPA obligations under section 5(b),(c) and (d). Petitioners

and BPA would assign that identical meaning to section 5(a), giving it no independent significance.

Their arguments also mean that section 10(c) would read:

Nothing in this Act shall alter, diminish, abridge, or otherwise affect the provisions of other Federal laws [EXCEPT FOR THE APPLICATION OF THOSE LAWS IN THE PACIFIC NORTH-WEST] by which public bodies and cooperatives are entitled to preference and priority in the sale of federally generated electric power.

16 U.S.C. §839g(c).

That reading is preposterous. BPA markets power from certain projects under the authority of the Bonneville Project Act, from other projects under the Flood Control Act of 1944 and from other projects under the Reclamation Act of 1939. *See pp. 1-2, supra; Draft EIS, note 20 supra, Appendix A at 1-18.* Federal power agencies in other regions of the country also market power from hydroelectric projects under the same provisions of the latter two acts. Petitioners and BPA argue that Congress, without saying so, intended to amend those acts as they applied to the Pacific Northwest, leaving them unchanged as they applied to the rest of the country.⁵²

A plain reading of section 5(a) and 10(c) resolves these inconsistencies. Preservation of preference and priority means that BPA must sell nonfirm energy from all federal hydroelectric projects to the publicly-owned utilities before the industries.

The legislative history, as well as the plain statutory language, rebuts the implausible argument that Congress intended to repeal *by implication* an express mandate of over forty years' standing.

In 1977 the Northwest congressional delegation introduced identical bills in the House and Senate dealing

⁵²See also H.R. Rep. No. 976, Part II, 96th Cong., 2d Sess. 57 (1980) which shows that section 10(c) applies to all laws except the Bonneville Project Act without geographic limitation.

with BPA and the Pacific Northwest power supply system. S. 2080 and H.R. 9020, 95th Cong., 1st Sess. (1977). The bills made no mention of preference for sales to publicly-owned utilities and were characterized by many as a weakening of preference.³³

In 1978 the Northwest delegation submitted new proposed regional power legislation which was designed to leave the preference rights of publicly-owned utilities unchanged.³⁴ These bills contained provisions authorizing sales of power by BPA to public bodies, privately-owned utilities and industries that were similar to section 5(b), (c) and (d) of the Regional Act and a surplus sales provision substantially similar to section 5(f) in the Regional Act.³⁵ However, they did not contain any provisions expressly protecting preference.

At the first hearings on the bills, representatives of the publicly-owned utilities testified that they understood that the intent of the bills was to preserve preference but that the bills did not carry out that intent.³⁶ A spokesman for the American Public Power Association explained that the proposed legislation conflicted with preference and priority because the section analogous to section 5(f) of the Regional Act:

³³E.g., *Pacific Northwest Electric Power Supply and Conservation: Hearings on H.R. 9020, 9664 and 5862 Before the Subcomm. on Water and Power Resources of the House Comm. on Interior and Insular Affairs*, Pt. V, 95th Cong., 1st Sess., 57 (1977) (remarks of Executive Director, Washington Public Utility Districts' Association).

³⁴*Pacific Northwest Electric Power Supply and Conservation Act: Hearings on S. 2060 and S. 3418 Before the Senate Comm. on Energy and Natural Resources*, 95th Cong., 2d Sess. 816 (Senator Jackson), 872 (BPA Administrator) (1978).

³⁵*Hearings on S. 2080 and S. 3418*, note 54 *supra*, 822-24 (section 5(a), (b), (c) and (d)).

³⁶*Hearings on S. 2080 and S. 3418*, note 54 *supra*, 1054 (Washington Public Utility Districts' Association), 1058, 1064 (Snohomish County Public Utility District), 1068-69 (American Public Power Association), 1079 (Public Power Council), 1103-04 (National Rural Electric Cooperative Association), 1112 (Eugene Water and Electric Board).

subordinates the preference provisions of the Bonneville Project Act to new rights created for private power companies and direct service industries. This is done by asserting that the Bonneville Project Act — and any other existing law related to BPA's marketing of federal power — applies to electric power which is surplus to obligations imposed by sections 5(a), (b) and (c) of S. 3418.

Hearings on S. 2080 and S. 3418, note 54 supra, 1069.

He said that the legislation should be amended "to state that all BPA sales are subject first to the preference provisions of the Bonneville Project Act." *Id.* Senator Jackson promised that the necessary amendments would be added to protect preference and priority. *Id.* 1062.

The 95th Congress adjourned prior to completion of consideration of the bills.¹⁷ In the 96th Congress, Senator Jackson reintroduced the proposed legislation as S. 885.¹⁸ At the same time, Senator Jackson introduced amendments which were designed to protect fully preference and priority. 125 Cong. Rec. S3997-99 (daily ed. Apr. 5, 1979). After minor modifications, the Senate adopted two of those amendments which were nearly the same as the preference provisions in the Regional Act, sections 5 and 10(d), S. 885.

Although the language of the two provisions is straightforward, the Senate Report prepared for S. 885 emphasizes that preference and priority applied to all BPA power sales. S. Rep. No. 272, 96 Cong., 1st Sess. 15, 20, 21, 26 [corrected by 125 Cong. Rec. S 11593 (daily ed. Aug. 3, 1979)], 35 (1979).

BPA prepared an analysis of S. 885 as part of its final EIS in December of 1980. See *Final EIS*, note 22 *supra*, at

¹⁷S. Rep. No. 272, 96th Cong., 1st Sess. 19 (1979).

¹⁸S. Rep. No. 272, 96th Cong., 1st Sess. 4, 14 (1979).

I-33 to I-37. BPA concluded that among the most significant elements of S. 885 (which it discussed as Alternative 3) was: "Preference and priority for public bodies and cooperatives in the sale of Federal power would be preserved intact." *Id.* at I-36. BPA also stated that under S. 885: "public bodies and cooperatives would retain their statutory preference to Federal power."⁵⁹

BPA, in its draft EIS issued in 1977, had presented alternatives it considered reasonable to its marketing plans for power. *See Draft EIS*, note 20 *supra*, Appendix C, Chapter III. It noted that federal law requires that available nonfirm energy first be offered to preference customers, and listed three possible allocation methods based on type of customer, noting that many of the allocation methods would require a change in the Bonneville Project Act. *Id.* at III-29 to III-30. The third alternative would have granted the industries a priority to nonfirm energy.⁶⁰

By December of 1980, BPA no longer believed that the third alternative was reasonable, and omitted the

⁵⁹*Id.*, at III-53; *see also id.* at IV-334. The EIS describes service of nonfirm energy to the industries as "continued" service, not increased service. *Id.*, at IV-336. If as BPA states it was "intimately involved in the legislative process" and "made major contributions to Congress' consideration of the statute" (Fed. Br. 17, 21), it is inexplicable that the EIS makes no mention of increased service of nonfirm energy to the industries or a reversal of priority to nonfirm energy. In the discussion of nonfirm energy sales under S. 885, there is no mention of a change in priority. *See id.*, at IV-336.

⁶⁰A third allocation method would provide that industries have priority, subject to utility requirements for secondary energy to serve firm loads, for a fixed quantity of secondary energy which the industries would use to serve their interruptible loads. Only energy in excess of this secondary energy would be available to preference customers and investor-owned utilities pursuant to one of the methods described above for displacement of their thermal resources" *Id.*, at III-30.

alternative from the Final EIS.⁶¹ The clarity of that abandoned alternative is in marked contrast to the inferences and convoluted reasoning used by petitioners and BPA to argue that the Regional Act grants the industries a priority to nonfirm energy.

After the Senate passed S.885, two committees in the House considered the bill (along with revisions of S.885). At the final hearings, the BPA Administrator again made it clear that publicly-owned utilities were to retain first call on all federal power, both firm and nonfirm:

We do sell, of course, surplus power after, and only after, the requirements of our preference customers have been met. We do not advocate that that be changed. The legislation before you, I believe, does not advocate that the preference clause be abrogated.

The legislation, I think the intent of it is to retain the preference clause, to assure that the preference customers of the Bonneville Power Administration will continue to have and will always have first call on the Federal-based system resources. Any effort that you or anyone else will make to assure that, I want to support, Mr. Ottinger, I think that is what is being attempted.

Pacific Northwest Electric Power Planning: Hearing on H.R. 3508 and H.R. 4159 Before the Subcomm. on Energy and Power of the House Comm. on Interstate and Foreign Commerce, 96th Cong., 1st Sess. 251 (1979).

I do not advocate the preference customers losing their preference. The legislation, specifically section 5(a) assuring the priority of the preference customers in access to the Federal-based system resource, I think specifically, in an effort to make sure there is no ambiguity or misunderstanding on that point, the legislation before you specifically

⁶¹See *Final EIS*, note 22 *supra*, at IV-335 to IV-336. Rules applicable to federal environmental impact statements require that final statements "[r]igorously explore and objectively evaluate all reasonable alternatives." 40 C.F.R. §1502.14(a) (1982); see also 42 U.S.C. §4332 (2)(c) (1976).

reiterates a commitment to the existing preference clause in the Bonneville Project Act.⁶²

Later, the House substituted for S. 885 a bill which became the Regional Act. The two House reports for the Regional Act overwhelmingly emphasize that preference and priority to all BPA power under all federal marketing statutes is preserved for publicly-owned utilities. The House Committee of Interior and Insular Affairs committed in its report not "to interfere in any way with, or modify, the statutory rights of preference customers either within or without the region." H.R. Rep. No. 976, Pt. II, 96th Cong., 2d Sess. 26 (1980); *see also id.* 34, 36, 57. The House Committee on Interstate and Foreign Commerce expressed its intent to protect preference and not "to undo nearly 80 years of history or establish any precedent." H.R. Rep. No. 976, Pt. I, 96th Cong., 2d Sess. 34 (1980); *see also id.* 24, 27, 33-35, 59, 74.

Congress intended to "assure," "fully preserve," "expressly preserve," "protect," "ensure," "retain," and "guarantee" the preference of publicly-owned utilities to all Bonneville power, both firm and nonfirm.⁶³

⁶²*Id.* 254-55; *see also id.* 252. The attorney for the industries (also one of the authors of the petitioners' brief) was present at the morning hearings when the Administrator testified, and later the attorney testified in the afternoon session but did not state that the Administrator was wrong or that priority to nonfirm energy had been reversed. *Pacific Northwest Electric Power Planning: Hearings on H.R. 3508 and H.R. 4159 Before the Subcomm. on Energy and Power of the House Comm. on Interstate and Foreign Commerce*, 96th Cong., 1st Sess. 310-423 (1979) (testimony of E. Redman). The attorney specifically discussed the purchase of nonfirm energy by Seattle City Light, a public preference utility. *Id.* 416.

⁶³As an example, Representative Lujan stated during debate on the bill that became the Regional Act: "The bill fully protects the preference clause of the Bonneville Project Act of 1937, thus assuring the publicly-owned utilities and other preference customers their full share of power." 126 Cong. Rec. H9845 (daily ed. Sept. 29, 1980). He also stated: "This bill provides a mechanism for making those allocations in an orderly fashion according to priorities which place the preference customers at the head of the line." *Id.*

Virtually every other member of Congress actively involved with the legislation stated a belief that preference was protected in the Act. *See* 125 Cong. Rec. H2061 (daily ed. Mar. 11, 1979) (Rep. Swift); *Pacific*

Giving full effect to the reaffirmation of preference and priority in the Regional Act as required by plain statutory language and legislative history, is consistent with the other provisions of the Act. It does not "paralyze" the remainder of the Regional Act as BPA argues. See Fed. Br. 24. It means that publicly-owned utilities have first call on BPA firm and nonfirm energy. Additionally, Congress gave BPA both the authority and the obligation to acquire sufficient resources to perform the new contracts provided for in section 5(b), (c) and (d).⁶⁴

As Senator Hatfield noted in his final remarks on the bill that became the Regional Act: "The purchase authority given to BPA provides it a means of providing power to the direct-service industries without offending the principles of 'preference.'"⁶⁵ The Regional Act as a whole and its legislative history are in harmony.

Northwest Electric Power Planning and Conservation Act: Hearings on S. 885 Before the Senate Comm. on Energy and Natural Resources, 96th Cong., 1st Sess. 67 (1979) (Sen. Melcher); 125 Cong. Rec. S11593 (daily ed. Aug. 3, 1979) (Sen. Hatfield); 125 Cong. Rec. S3999 (daily ed. Apr. 5, 1979) (Sen. Jackson); Pacific Northwest Electric Power Planning: Hearings on H.R. 3508 and 4159 Before the Subcomm. on Energy and Power of the House Comm. on Interstate and Foreign Commerce, 96th Cong., 1st Sess. 67 (1979) (Rep. Foley); 126 Cong. Rec. E1169 (daily ed. Sept. 29, 1980) (Rep. Clausen); id. H9848 (Rep. Dingell); id. H9849 (Rep. Moorhead); id. H9850-52 (Rep. Swift); id. H9855 (Rep. Symms); id. H9860 (Rep. Gore); id. H9862 (Rep. Duncan); 126 Cong. Rec. H10675 (daily ed. Nov. 17, 1980) (Rep. Lujan); id. H10677 (Rep. Brown); id. H10678 (Rep. Foley); id. H10679 (Rep. Swift); id. 126 Cong. Rec. S14693 (daily ed. Nov. 19, 1980) (Sen. Hatfield).

No member of Congress ever stated that the priority to nonfirm energy would be changed.

⁶⁴16 U.S.C. §839d(a)(2). Senator Jackson in remarks before the Senate concluded that "the authority for BPA to acquire from non-Federal entities additional electric power resources, including conservation, to meet the electric needs of Northwest consumers" was the "heart" of the Act. 126 Cong. Rec. S14690 (daily ed. Nov. 19, 1980). To help ease the deficit in power, the bill also provided incentives for utilities to conserve electricity and to build resources, to sell to BPA or to serve their own loads. 16 U.S.C. §839d (d), (f), (h).

⁶⁵126 Cong. Rec. S14693 (daily ed. Nov. 19, 1980). Senator Hatfield also stated: "In turn, BPA can sell power to the DSI's only because of purchase authority which is, then, the essential link to achieving rate parity in the region." *Id.* S14694.

II. THE REGIONAL ACT LIMITS THE INDUSTRIES TO AN AMOUNT OF POWER EQUIVALENT TO THAT ALLOWED UNDER THEIR EXPIRING CONTRACTS

The Regional Act authorized BPA to continue to serve the industries. Congress gave BPA authority to acquire additional resources. However, Congress carefully crafted the Regional Act to limit BPA service to the industries to the same service they had received before the Act and to require that the industries continue to provide BPA with reserves for firm loads.

Petitioners and BPA now argue that the Act mandates that the industries receive increased nonfirm energy service and provide decreased reserves.⁶⁶

Petitioners and BPA strain to avoid admitting that their arguments mean that the industries receive an amount of power greater than that authorized by their expiring contracts. They use euphemisms such as "quasi-firm," "improved power quality" and "improved terms of power sale" for what is in fact a greater amount of power.⁶⁷

⁶⁶Petitioners capsule the argument: "By limiting to the protection of BPA's firm loads the purposes for which first quartile power may be restricted, Congress changed the DSI's power commitment from their 1975 contracts, under which first quartile power could be restricted 'at any time'." Pet. Br. 22.

⁶⁷See Fed. Br. 14, 18-19. Petitioners previously characterized "service of energy to the first quartile load as 'a junior firm' type of power." BPA, *Administrator's Record of Decision, 1981 Transmission Rate Proposal and 1981 Wholesale Power Rate Proposal, IV-14 (June, 1981)*.

BPA has admitted that the industries receive an increased quantity of power. J.A. 100 (the first quartile is "served by operating resources to provide a power quantity with firm characteristics . . ."), 106 ("the DSIs sought and achieved a significantly improved service: '... a quantity of power . . .'").

A. Section 5(d) (1) (B) — The Industries Are Limited to an Amount of Firm and Nonfirm Power Equivalent to the Entitlement under Their 1975 Industrial firm Power Contracts

Section 5 (d) (1) (B) of the Regional Act limits the petitioners to: *"an amount of power equivalent to that to which such customer is entitled under its contract dated January or April 1975 providing for the sale of 'Industrial Firm Power.'"* 16 U.S.C. §839c(d) (1)(B). [Emphasis added]

Under this provision, the Regional Act gives the industries no greater rights than they had before the Regional Act, when BPA sold nonfirm energy first to the publicly-owned utilities and then equally to the privately-owned utilities and the industries. If BPA changes the priority to nonfirm energy, the increased availability of nonfirm energy for the industries violates the Regional Act's limitation.

The Ninth Circuit followed the plain meaning of section 5(d) (1) (B). The court concluded that the section did not entitle the industries to a priority to nonfirm energy because the section linked the industries to their 1975 contracts and because under those contracts the industries received nonfirm energy only after the publicly-owned utilities. 686 F.2d at 712 n. 4.

Petitioners and BPA ignore the plain language of section 5(d) (1) (B) and assert that the section's sole purpose is to authorize the industries to purchase an amount of power sufficient to serve, on a 100 percent firm basis, the full loads set forth in their 1975 contracts."

"Fed. Br. 28-30; Pet. Br. 24. BPA's support for its argument is truly imaginative; it argues that Congress intended to grant to the industries the full load requirements expressed in their 1975 contracts because an early version of the legislation (H.R. 13931) authorized BPA to meet the industries' "load requirements" without mention of the 1975 contracts. See Fed. Br. 28-30. The simple answer to BPA's argument is that Congress said "requirements" when it wanted to provide for requirements and did not do so in section 5(d)(1)(B). See 16 U.S.C. §839c(e)(1). A second answer is provided by what "load requirements"

They cite only an "amount of power" in section 5(d) (1) (B), thus, making the term "equivalent" and the specific reference to the 1975 contracts "providing for the sale of 'Industrial Firm Power'" inconsequential."

Petitioners and BPA are incorrect. All of the language in section 5(d) (1) (B) must be given meaning. By tying service to the industries to the equivalent amount of power under the 1975 contracts providing for Industrial Firm Power, section 5(d) (1) (B) of the Regional Act preserves the pre-Act priorities to nonfirm energy.¹⁰

Congress referred to "Industrial Firm Power" in section 5(d) (1) (B) because the phrase has a specific meaning. The phrase is defined in the 1975 contracts to mean that BPA can restrict nonfirm service to the first

meant in H.R. 13931. An attorney for the industries (and one of the authors of petitioners' brief) testified that H.R. 13931 required:

the DSI's to trade in their existing contracts for low-cost power, contracts which have on the average another 8 or 9 years to run, in exchange for new contracts with dramatically higher costs and reduced firm power.

The only benefit the DSI's receive is the assurance of new long-term contracts which will permit them to plan their future operations and investments.

Pacific Northwest Electric Power Issues: Hearings on H.R. 13931 Before the Subcomm. of Energy and Power of the House Comm. on Interstate and Foreign Commerce, 95th Cong., 2d Sess. 254 (1978) (testimony of E. Redman).

"See Fed. Br. 23, 29; Pet. Br. 24, 25, 39. BPA has conceded elsewhere that section 5(d)(1)(B) refers to more than "amount of power." It has relied on that section to require that the second quartile load of the industries have no greater restrictions than existed before the Act. J.A. 96.

"Congress was concerned that sales of power to the industries not increase over the pre-Act amounts. In section 5(d)(3) Congress prohibited BPA from selling "amounts of electric power, including reserves, to existing direct service industrial customers in excess of the amount permitted" under the pre-Act contracts unless the Administrator and the Pacific Northwest Electric Power and Conservation Planning Council made certain findings. 16 U.S.C. §839c(d)(3). BPA and the Council have not made the findings required by section 5(d)(3).

quartile load at any time, without limitation.¹¹ Thus, if nonfirm energy is not available, BPA does not serve the first quartile load with nonfirm energy.

The concept of equivalent amount of power is used elsewhere in the Regional Act in a way which refutes the arguments of petitioners and BPA. The Act provides that the Administrator shall purchase power from the privately-owned utilities and offer "in exchange, to sell an equivalent amount of electric power to such utility." 16 U.S.C. §839c(c) (1). The amount of this exchange varies with the loads of the utility so that the amount of power exchanged is always equivalent.¹² The amount is not a fixed, unchanging amount.

BPA's attempt to grant a priority to nonfirm energy to the industries violates section 5(d) (1) (B).

B. Section 5(d)(1)(A) and 3(17) — The Industries' Provision of Reserves for Firm Loads Does Not Create a Priority to Nonfirm Energy

Section 5(d) (1) (A) of the Regional Act provides that sales of power to the industries "shall provide a portion of

¹¹Under the 1975 contracts, the Administrator made "Industrial Firm Power (as defined in section 1.4 of Exhibit B)" available for purchase by his industrial purchasers. Pet. for Cert. App. N-2 §4(a). The 1975 contracts define Industrial Firm Power as power that BPA will make continuously available unless restricted by BPA. J.A. 112 [§1.4]. BPA could restrict deliveries of energy to the first quartile load "at any time" without limitation. XXIII COR 6305 [§8].

Thus, the amount of nonfirm power supplied by BPA under the 1975 contracts for the first quartile load was subject to nondelivery or restriction at any time that nonfirm power was not available. See J.A. 43; see also *Port of Astoria v. Hodel*, 595 F.2d 467, 472 (9th Cir. 1979) (Industrial Firm Power "denotes a new method or structure for distributing power to industry.").

¹²16 U.S.C. §839c(c)(2); H.R. Rep. No. 976, Pt. I, 96th Cong., 2d Sess. 59, 60-61 (1980); H.R. Rep. No. 976, Pt. II, 96th Cong., 2d Sess. 35 (1980). BPA has incorporated this concept in the contracts it recently offered. IX COR 2541-42 [§5], 2545 [Ex. D. §1].

the Administrator's reserves for firm power loads within the region." 16 U.S.C. §839c(d) (1) (A). Section 3(17) provides that reserves are created by BPA's right to interrupt service to certain customers in order to serve its firm power customers. 16 U.S.C. §839a(17).

Petitioners and BPA argue that sections 5(d) (1) (A) and 3(17), which make no mention of entitlement to power, imply a right for the industries to be served nonfirm energy ahead of the publicly-owned utilities.⁷³ Further, they argue that BPA's right to interrupt sales of nonfirm energy to the industries, a right BPA has with all nonfirm customers, establishes the industries' entitlement to nonfirm energy. Fed. Br. 19, 26; Pet. Br. 6, 22, 25-26.

Entitlement creates reserves, not vice versa. Service to the industries is required only if the industries are entitled to power. Service is not required simply because the industries provide reserves whenever they are entitled to be served. The industries are not entitled to nonfirm energy if there is none available. Only when there is nonfirm energy available and they are entitled to the energy are reserves created.

Petitioners' and BPA's arguments are based on two incorrect assumptions. The first is that the Regional Act changed the reserves the first quartile load provides. However, no change in reserves occurred. In its final EIS, BPA described the reserves that service of nonfirm energy to the first quartile load provides:

This quartile is served from secondary energy available only on an intermittent basis and is frequently interrupted. When prudent operation dictates the top quartile of the IF load be interrupted to ensure service to BPA firm loads, BPA will frequently make available Advance Energy."⁷⁴

⁷³BPA relied solely on these two sections as the "clear statutory basis" for granting the DSIs a priority to nonfirm energy in its Record of Decision offering the contracts and in its brief on the merits to the Ninth Circuit. See J.A. 101; Br. Fed. Resp. (9th Cir.) 19-25.

⁷⁴J.A. 31 [Emphasis added]; see also *Port of Astoria v. Hodel*, 595 F.2d 467, 471-72 (9th Cir. 1979); VIII COR 2338-39.

Congress in passing the Act clearly understood that the reserves provided by service to the first quartile load remained the same. The House Report states that the first quartile load would be interrupted "in order to protect the Administrator's firm loads within the region at any time and for any period, as determined by BPA." H.R. Rep. No. 976, Pt. I, 96th Cong., 2d Sess. 62 (1980).

Nowhere is there an indication in the legislative history that Congress believed it was decreasing the reserves provided by the industries.

The second incorrect assumption is that only the sale of nonfirm energy to the industries can provide reserves. The sale of nonfirm energy to any customer provides reserves. *See* p. 10 *supra*. The Regional Act is in agreement by providing that sales of power to the industries "shall provide a portion of the Administrator's reserves." 16 U.S.C. §839c(d) (1) (A).

Petitioners' and BPA's arguments fail for three independent reasons: (1) the provision of reserves does not mandate what sales must be made; (2) sales of nonfirm energy to any customer provide a reserve; and, (3) the Regional Act does not change the type of reserves which sales to the first quartile load provide.

C. The Legislative History Cited By Petitioners and BPA Does Not Support a Priority to Nonfirm Energy for the Industries

The Ninth Circuit examined the legislative history cited by BPA and the industries to support a reversal of priority to nonfirm energy and concluded that the legislative history did not provide the claimed support. 686 F.2d at 713-14.

Petitioners and BPA cite again essentially the same sections of the legislative history they cited to the Ninth

Circuit.⁷⁵ These sections do not state that Congress intended to grant a priority to nonfirm energy to the industries or that Congress intended that a 1,000 megawatt load be placed ahead of the publicly-owned utilities' needs for nonfirm energy or even that Congress intended to give the industries more nonfirm energy.⁷⁶

The most detailed section of legislative history cited by petitioners and BPA is in Appendix B to the Senate Report for S.885.⁷⁷ Appendix B was an illustrative numerical analysis of the estimated BPA wholesale power rates under S.885.

"BPA for the first time cites testimony from hearings held on H.R. 9020 in late 1977 to support increased service to the industries. Fed. Br. 30. As pointed out by BPA elsewhere in its brief, H.R. 9020 proposed to allocate a specific number of megawatts to the industries and did not pass. Fed. Br. 28.

"Congressional omission of such a statement is illogical in light of BPA's contention that "Congress was fully cognizant that the 1980 Act would modify the quality of power whose allocation would be governed by preference rights in the region." Fed. Br. 25. The absence of a clear statutory statement and a clear statement in the legislative history is significant:

Courts in the past have been able to rely upon legislative history for important insights into congressional intent. Without implying that this is no longer the case, we note that interest groups who fail to persuade a majority of the Congress to accept particular statutory language often are able to have inserted in the legislative history of the statute statements favorable to their position, in the hope that they can persuade a court to construe the statutory language in light of these statements. This development underscores the importance of following unambiguous statutory language absent clear contrary evidence of legislative intent.

National Small Shipments Traffic Conference, Inc. v. Civil Aeronautics Board, 618 F.2d 819, 828 (D.C. Cir. 1980); see also *United Airlines, Inc. v. Civil Aeronautics board*, 569 F.2d 640, 647 (D.C. Cir. 1977); Redman, *The Dance of Legislation*, 119-20 (1973).

There are numerous sections in the committee reports for the Regional Act not cited by BPA and the petitioners that discuss service to the loads of the industries and make no mention of increased service or an industry priority to nonfirm energy. H.R. Rep. No. 976, Pt. II, 96th Cong., 2d Sess. 34 (1980); H.R. Rep. No. 976, Pt. I, 96th Cong., 2d Sess. 28-29, 36, 61-62 (1980); see also S. Rep. No. 272, 96th Cong., 1st Sess. 15, 28 (1979).

"Fed. Br. 33; Pet. Br. 32. BPA's use of Appendix B is ironic since BPA's counsel has previously disparaged its usefulness:

S. Rep. No. 272, 96th Cong., 1st Sess. 56 (1979). The Appendix provided a short discussion of parts of the bill. The discussion uses a 55 percent service to the first quartile load of the industries under the bill *which reflects their historical availability of service*. See *id.* 67.

Petitioners and BPA base their "mandate" for a reversal in the priority to nonfirm energy on the following statement in Appendix B:

The quantity of power for rate purposes is based on the proportion of the total industrial requirement, on a long-term average (currently estimated to be between [1] 85 percent and 96 percent of the total DSI load), that BPA projects it will be able to serve directly. This projected availability is predicated on the continued planning and development of 'firm' resources under critical streamflow conditions to carry 75 percent of the total DSI requirements. The balance would be served with [2] resources which are in excess of critical planning amounts but [3] operated to meet the entire DSI Load as if it were firm. The operation of the System to carry out this purpose results from treating as a firm load the maximum amount of the DSI Load (not all of which can be covered under critical streamflow planning), to the extent that this maximum load can be met in the initial period of the PNW Coordination Agreement Critical Period while protecting firm loads against the worst historical streamflow and maintaining an ability to restrict an equivalent amount of the DSI Loads. S. Rep. No. 272, 96th Cong., 1st Sess. 59 (1979). [Emphasis and bracketed numbers added.]

The use of Appendix B is cast in doubt by the general rule of statutory construction that the proper function of legislative history is to solve and not create an ambiguity. As read against the words of the Act and the entire remainder of the legislative history, Appendix B alone creates the ambiguity. The continuing vitality of the numerical analysis of Appendix B of the Senate Report is also cast in doubt by the fact that it was never incorporated or referred to in the House Commerce and House Interior Reports. Preference Customer Memorandum (9th Cir.) Ex. D-5. (quoting BPA brief from 1981 Wholesale Rate Proceeding) (Footnote and citations omitted.)

This quotation does not provide for increased service of nonfirm energy to the first quartile load. Rather, it provides for a continuation of past BPA service to the industries.

First, part [1] anticipates a continuance of BPA's historic service of 85 percent to 96 percent of the industries' total loads.⁷⁸

Second, part [2] states that the first quartile load will be "served with resources which are in excess of critical planning amounts," i.e., nonfirm energy. This service is again a continuation of prior service to the first quartile load with nonfirm energy.

Finally, part [3] states that BPA will operate its resources:

to meet the entire DSI Load as if it were firm [by] . . . treating as a firm load the maximum amount of the DSI load . . . to the extent that this maximum load can be met in the initial period of the PNW Coordination Agreement Critical Period while protecting against the worst historical streamflow.

This direction is based on a belief that the first quartile should be treated as a "firm load" for purposes of BPA operation under the Pacific Northwest Coordination Agreement so that BPA can shift the Firm Energy Load Carrying Capability of the Coordinated System to serve the first quartile load. This is the "shift" service described at p. 12 *supra*. Again, this direction says nothing about an increased service of nonfirm energy to the first quartile load.⁷⁹

⁷⁸Petitioners conveniently drop the 85 percent and conclude that "Congress expressly adopted this plan to assure the industries an increased average power availability (96%)." Pet. Br. 34; *see also id.* 9 n.15.

⁷⁹*See* 686 F.2d at 713-14 & n.7; J.A. 50. These respondents explained page 59 of the Senate Report to the Ninth Circuit. Preference Customer Memorandum (9th Cir.) 22-26; Preference Customer Reply Memorandum (9th Cir.) 20. BPA has never refuted this explanation. Petitioners argue that page 59 of the Senate Report requires that BPA operate its system

The other two sections of legislative history upon which petitioners and BPA rely define the reserves provided by service to the industries and do not establish an industry priority to nonfirm energy. H.R. Rep. No. 976, Pt. II, 96th Cong., 2d Sess. 48 (1980).¹⁰; S. Rep. No. 272, 96th Cong., 1st Sess. 28 (1979).¹¹

None of these sections of legislative history reflect the "unmistakable precision" that BPA contends is present or the "highly specific understanding"¹² that BPA contends

to carry the first quartile load as a firm load by giving it a priority to nonfirm energy. Pet. Br. 40 n.111. Petitioners' argument creates an additional firm load for BPA in contradiction of Congress' intent that there "be no increase in firm power commitments" for the industries. S. Rep. No. 272, 96th Cong., 1st Sess. 28 (1979).

¹⁰See Fed. Br. 34; Pet. Br. 30. Because of their use of ellipses, petitioners' quotation from the House Report is misleading. This part of the legislative history also provides that the industries are to "continue to provide" reserves and that "no additional BPA sales to existing DSIs are authorized" beyond their entitlement under the 1975 contracts. The legislative history also states here that "[a]pproximately 25 percent of the DSI load is to be treated as a firm load for purposes of resource operation" indicating an intent that the first quartile load may be treated as a "firm load" for purposes of the Pacific Northwest Coordination Agreement so that BPA can shift water to serve it. See p. 39, *supra*.

¹¹Fed. Br. 25, 32; Pet. Br. 28.

¹²See Fed. Br. 20, 35. BPA contends that it informed Congress by letter in August of 1980 about the reserves that the industries would provide and that because the House Interior Committee included this statement in its report (H.R. Rep. No. 976, Pt. II, 96th Cong., 2d Sess. 48 (1980)), Congress understood how the industries' first quartile load was to be served. See Fed. Br. 8 n.10. This contention is incorrect. First, reserves do not create entitlement. Second, the letter makes no mention that the industries are to receive a priority to nonfirm energy or an increased service of nonfirm energy. Third, the letter, in describing how the value of industry reserves is to be calculated, states: The average megawatts of regional reserves being provided are normally considered to be one-half the DSI load. A more precise estimate is determined by taking one quartile of the DSI load plus whatever portion of the top quartile is assumed to be available in the given year." VIII COR 2345.

This quotation admits that the entire first quartile load of the industries does not provide a reserve but only the portion that can be served by *available* power. BPA argues, however, that under section 5(d)(1)(B) the first quartile load is entitled to 100 percent service and that, therefore, the entire first quartile load provides a reserve. The

occurred regarding service of nonfirm energy to the first quartile load of the industries.¹¹ Provisions of legislative history affirming preference and priority for public bodies to all power abound; provisions of legislative history reversing that priority and increasing nonfirm energy service to the industries are nonexistent.

III. AFTER GIVING BPA'S POSITION EVEN GREATER DEFERENCE THAN THIS COURT'S DECISIONS REQUIRE, THE NINTH CIRCUIT CORRECTLY CONCLUDED THAT BPA'S PROPOSED INTERPRETATION OF THE REGIONAL ACT IS UNREASONABLE

Petitioners and BPA make much of what they call the Ninth Circuit's failure to give "appropriate deference" to BPA's construction of the Regional Act.¹² That construction, however, received all the consideration to which it was entitled, and more. The Ninth Circuit adopted petitioners' and BPA's position that BPA's construction

quotation provides a simple answer to BPA's argument; if nonfirm energy is not available because of low water or publicly-owned utility priority, the first quartile load is not entitled to be served.

"The understanding of counsel for the industries regarding service to the industries was stated during the final public hearings on the Regional Act:

Planning certainty has value; it's worth paying for. Under this legislation, the price of a reasonable degree of planning certainty for the DSI's is the surrender of their existing low-cost power contracts in exchange for new contracts with dramatically higher rates and *substantially lower power quality*. Other regional consumers would not have to pay higher rates or accept lower quality power as a result of this legislation, but they do need and will benefit from planning certainty just as the DSI's will.

Pacific Northwest Electric Power Planning: Hearings on H.R. 3508 and 4159 Before the Subcomm. on Energy and Power of the House Comm. on Interstate and Foreign Commerce, 96th Cong., 1st Sess. 311 (1979) (testimony of Eric Redman). [Emphasis added]

"Both complain because the Ninth Circuit did not accept BPA's *present* construction of the Act. They ignore the fact that BPA's construction of the relevant portions of this legislation has changed over time (see pp. 14-15 *supra*), and they offer no reasons why the Court should give more deference to BPA's present construction of the Act than to any of its previous positions.

was entitled to substantial deference and even to "additional weight" because BPA had participated in drafting the legislation.⁸⁵ The court also expressly limited its review to whether BPA's interpretation was reasonable.⁸⁶

The Ninth Circuit thus employed a more limited scope of review than that recently employed by this court. See *Public Service Commission of the State of New York v. Mid-Louisiana Gas Co.*, _____ U.S. _____, 51 U.S.L.W. 5030 (1983). In that case, although the Court agreed with the general proposition that the agency's interpretation of the statute was entitled to "substantial deference," it gave that deference in the form of "careful consideration" of the agency's arguments. Those arguments were not persuasive, and the Court construed the statute according to the Congressional intent revealed by the statutory language itself and by the legislative history.⁸⁷

⁸⁵The publicly-owned utilities were equally involved in the drafting process. 125 Cong. Rec. S 3998-99 (daily ed. Apr. 5, 1979) (Sen. Jackson); 126 Cong. Rec. H 9848 (daily ed. Sept. 29, 1980) (Rep. Dingell); 125 Cong. Rec. S 11592 (daily ed. Aug. 3, 1979) (Sen. Hatfield).

⁸⁶686 F.2d at 710-11. BPA's proposed construction, as the Ninth Circuit pointed out, was based on flawed reasoning, 686 F.2d at 712, would conflict with the Act's clear preference provisions, 686 F.2d at 713, relied on indirect statutory references and multiple inferences to create a significant exception to the direct preference provisions, 686 F.2d at 713-14, and would contravene the purpose of the preference clause. 686 F.2d at 715. Although the court believed that some support for BPA's interpretation could be found in the legislative history, that purported support was itself ambiguous. 686 F.2d at 713 n. 7. The legislative history supporting the court's construction of the Act, however, was explicit and direct. 686 F.2d at 713 n. 6.

⁸⁷As the Court pointed out in another recent decision:

The interpretation put on the statute by the agency charged with administering it is entitled to deference [citations omitted], but *the courts are the final authorities on issues of statutory construction*. They must reject administrative constructions of the statute, whether reached by adjudication or by rulemaking, that are inconsistent with the statutory mandate or that frustrate the policy that Congress sought to implement.

The Court's analysis in that case is remarkably apposite here. The Court noted that the statutory scheme itself was detailed and comprehensive, that there was statutory language directly indicating a Congressional intent to continue a policy which had been in effect for many years, and that there was no clear language showing an intent to change that policy by excluding a significant source of natural gas production from the pricing structure. Therefore, it held that the Federal Energy Regulatory Commission could not exclude pipeline production by rule.

Similarly, the Regional Act is comprehensive in its provision for the allocation of power. It expressly states that all power sales are to be subject to preexisting preference and priority statutes. The Act contains no indication of an intent to create, or to allow BPA to create, an exception to the long-standing policy expressed in those provisions.

Petitioners and BPA cite many cases containing general language about deference to statutory construction by administrative agencies. That language must be considered in light of the context in which it was used."

In many of the cited cases the agency was carrying out a Congressional mandate to exercise extremely broad powers of a legislative nature or to give specific content to

Federal Election Commission v. Democratic Senatorial Campaign Committee, 454 U.S. 27, 32 (1981). [Emphasis added; citations omitted.] The Ninth Circuit in this case did precisely what that passage requires.

"In *Udall v. Tallman*, 380 U.S. 1 (1965), for example, the Court was deferring to an agency's interpretation of its own orders and regulations. Similarly, the major problem in *Power Reactor Development Co. v. Int'l Union of Electrical, Radio and Machine Workers*, 367 U.S. 396 (1961) was the construction of the agency's own regulation. *Apex Hosiery Co. v. Leader*, 310 U.S. 469 (1940), did not involve interpretation by an agency at all. The Court concluded that Congress was satisfied with a long-standing judicial construction of the Sherman Act.

very general statutory language.¹⁹ No such discretion is involved here.

Even when discretion of that kind has been delegated to an agency, it is only the agency's *reasoned* exercise of authority *at the time* which is entitled to deference. Courts are under no obligation to defer to arguments proposed by counsel, in litigation, as after-the-fact attempts to justify the agency's action. *Investment Company Institute v. Camp*, 401 U.S. 617, 627-28 (1971). The court owes no deference whatsoever to arguments advanced for the first

¹⁹*American Paper Institute v. American Electric Power Service Corp.*, ____ U.S. ____, 103 S. Ct. 1921 (1983) (FERC directed by statute to set rates which were "just and equitable" and "in the public interest," and to make "such rules as it determines necessary to encourage cogeneration and small power production"); *Blum v. Bacon*, 457 U.S. 132 (1982) (approving regulations specifying necessary content of state public assistance plan to be approved by Secretary of HEW, under authority to promulgate rules "not inconsistent with this chapter, as may be necessary..."); *CBS, Inc. v. Federal Communications Commission*, 453 U.S. 367 (1981) (statute authorized FCC to revoke broadcasting license for failure to provide "reasonable" access and directed it to make rules as "may be necessary"); *Board of Governors v. Investment Company Institute*, 450 U.S. 46 (1981) (Federal Reserve Board's authority to determine that certain activities were "so closely related to banking... as to be a proper incident thereto"); *E.I. DuPont de Nemours & Co. v. Collins*, 432 U.S. 46 (1977) (SEC directed to determine whether proposed merger was "reasonable and fair" or "involved overreaching"); *Mourning v. Family Publications Service*, 411 U.S. 356 (1973) (Congress directed Federal Reserve Board to make rules to carry out purposes of Truth in Lending Act, expressly including authority to adopt provisions, in its judgment, necessary or proper to prevent circumvention or evasion of the Act); *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555 (1980) (same statute; court deferred to interpretation of the Act and of Board's regulation by Board and staff, noting specific Congressional action to promote reliance on such interpretations); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969) (FCC directed by Congress to make rules as required by public convenience, interest or necessity, and to "consider the demands of the public interest"); *Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294 (1933) (Tariff Commission authorized to promulgate "reasonable" procedure and rules and to give interested parties "reasonable opportunity" to be heard).

A comparable provision of the Regional Act that might require the Administrator to give specific content to statutory language is the requirement that the Administrator recover through such "provisions, as the Administrator deems appropriate" any advances made under section 6 to assist in the development of a resource. See 16 U.S.C. §839d(f)(3).

time in this litigation which constitute merely "counsel's *post hoc* rationalizations for agency action . . ." *Id.* at 628, quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168-69 (1962). See pp. 20-21 *supra*.

In other cases in which this Court deferred to an agency's interpretation, the agency's task was to make factual or technical determinations within its field of special expertise.⁹⁰ The preference and priority provisions of the Regional Act are simple and straightforward. It is the arguments of petitioners and BPA which are technical and complicated.

Finally, many of the cases upon which petitioners and BPA rely simply uphold an agency practice or interpretation which Congress had allowed to continue over a substantial period of time.⁹¹ They offer no support for deference to an abrupt change of interpretation.

⁹⁰*E.I. duPont de Nemours & Co. v. Collins*, 432 U.S. 46 (1977) (determination by SEC that management investment company was properly valued according to market value of its stock holdings); *Board of Governors v. Agnew*, 329 U.S. 441 (1947) (determination by Federal Reserve Board that particular firm was "primarily engaged" in underwriting); *Unemployment Compensation Comm'n v. Aragon*, 329 U.S. 143 (1946) (determination by territorial Unemployment Compensation Commission that particular labor dispute was in "active progress" at specific time).

A comparable determination under the Regional Act might be a determination, whether a resource the Administrator proposes to acquire under section 6(d) is an "experimental, developmental, demonstration, or pilot project" and has a "potential for providing cost-effective service." See 16 U.S.C. §839d(d).

⁹¹*CBS, Inc. v. Federal Communications Commission*, 453 U.S. 367 (1981) (9 years); *Howe v. Smith*, 452 U.S. 473 (1981) (29 years); *E.E.O.C. v. Associated Dry Goods Corp.*, 449 U.S. 590 (1981) (15 years); *Andrus v. Shell Oil Co.*, 446 U.S. 657 (1980) (60 years); *United States v. Rutherford*, 442 U.S. 544 (1979) (over 18 years); *Board of Governors v. First Lincolnwood Corp.*, 439 U.S. 234 (1978) (22 years); *Zenith Radio Corp. v. United States*, 437 U.S. 433 (1978) (over 80 years); *Power Reactor Development Co. v. Int'l Union of Electrical, Radio and Machine Workers*, 367 U.S. 396 (1961) (6 years); *Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294 (1933) (more than 11 years).

In every one of the above cases, the Court found specific evidence that the agency's interpretation had been reviewed and acquiesced in by Congress after the enactment of the legislation in question, often on more than one occasion.

None of the cited cases holds that an agency can create an exception to mandatory statutory language in reliance on indirect inference:

This Court has firmly rejected the suggestion that a regulation is to be sustained simply because it is not "technically inconsistent" with the statutory language, when that regulation is fundamentally at odds with the manifest congressional design. *United States v. Cartwright*, 411 U.S. 546, 557, 93 S. Ct. 1713, 36 L.Ed.2d 528 (1973). The challenged regulation is not a reasonable statutory interpretation unless it harmonizes with the statute's 'origin and purpose.' *National Muffler Dealers Assn. v. United States*, *supra*, 440 U.S. at 477, 99 S. Ct. at 1307" *United States v. Vogel Fertilizer Co.*, 455 U.S. 16, 26, 102 S. Ct. 821, 828 (1982).

Nor can it be avoided by reference to obscure and ambiguous legislative history. In *Zuber v. Allen*, 396 U.S. 188 (1969), the Secretary of Agriculture argued that Congress had approved certain marketing differentials because computations supporting a similar differential had been included in a report to Congress. The Court rejected that argument because the "stark figures" in the appendix had not been the subject of discussion so as to give the matter "notoriety." 396 U.S. at 194. The agency's participation in the drafting of the legislation did not convince the Court that the agency's proposed construction was correct. The agency had not made that construction known to Congress. 396 U.S. at 193.

BPA's reliance on legislative history in this case is no more persuasive. See pp. 36-41 *supra*. Its present construction was never called to the attention of the many members of Congress who assured that there would be *no* change in the rules of preference and priority.

The principle of deference to agency interpretation sometimes provides a framework for judicial analysis in statutory construction.⁹² It "does not displace" that analysis. *United States v. Vogel Fertilizer Co.* *supra*, 455 U.S. 24, 102 S. Ct. 827, quoting *United States v. Cartwright*, 411 U.S. 546, 550 (1973). The Ninth Circuit, which has long experience in the operation of preference clauses and federal power marketing policy,⁹³ properly analyzed the Regional Act. Its conclusions are correct under the rules announced by this Court in *United States v. Rutherford*, 442 U.S. 544 (1979):

Exceptions to clearly delineated statutes will be implied only where essential to prevent 'absurd results' or consequences obviously at variance with the policy of the enactment as a whole. 442 U.S. at 552.

Only when a literal construction of a statute yields results so manifestly unreasonable that they could not fairly be attributed to congressional design will an exception to statutory language be judicially implied. 442 U.S. at 555.

BPA's proposed interpretation would turn those rules upside down.

⁹²In fact, this Court often decides that an administrative agency has incorrectly construed an act of Congress without any mention at all of principles of deference. Recent examples include: *Dirks v. Securities and Exchange Commission*, _____ U.S. _____, 103 S. Ct. 3255 (1983); *Edward J. DeBartolo Corp. v. N.L.R.B.*, _____ U.S. _____, 103 S. Ct. 2926 (1983); see also *F.C.C. v. Midwest Video Corp.*, 440 U.S. 705, 708 (1979) (Court refused to defer when Congressional intent to limit agency's broad rulemaking authority was clear from other provisions of the act).

⁹³See, *Anaheim v. Duncan*, 568 F.2d 1326 (9th Cir. 1981); *Anaheim v. Kleppe*, 590 F.2d 285 (9th Cir. 1978); *City of Santa Clara v. Andrus*, 572 F.2d 660 (9th Cir. 1978), cert. denied sub nom. *Pacific Gas & Electric Co. v. City of Santa Clara*, 439 U.S. 859 (1978); *Arizona Power Pooling Association v. Morton*, 527 F.2d 721 (9th Cir. 1975), cert. denied sub nom. *Arizona Public Service Co. v. Arizona Power Pooling Association*, 425 U.S. 911 (1976).

CONCLUSION

The Court should affirm the judgment of the Ninth Circuit Court of Appeals.

Respectfully submitted,

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October 11, 1983

APPENDIX

App-1

(AUTHENTICATED COPY)

[Department Seal]

Department of Energy DE-M 579-81BP90343
Bonneville Power Administration
P.O. Box 3621 Office of the Administrator
Portland, Oregon 97208

In reply refer to: PCI

Aug. 27, 1981

Mr. B. D. Cocknell
Aluminum Company of America
1501 Alcoa Building
Pittsburgh, PA 15219

Mr. B. D. Cocknell
Northwest Alloys, Inc.
Aluminum Company of America
1501 Alcoa Building
Pittsburgh, PA 15219

Dear Mr. Cocknell:

In response to your request to be offered the power sales contract under the Pacific Northwest Electric Power Planning and Conservation Act, this written offer is sent to you for your consideration.

The enclosed four copies of the initial long-term power sales contracts are the result of the negotiation process just completed. Please note that the Bonneville Power Administrator has already signed this contract. The signed contract constitutes a firm offer as required by the Regional Act. Your Company has one year from the date it receives this offer to accept it by signing and returning the contract to Bonneville.

Bonneville is aware that the Industrial Purchasers do not necessarily agree with Bonneville on the existence or the extent of Bonneville's right to displace all or any of its available resources in a manner that would reduce the availability of power for service to the first quartile of the Industrial Purchasers' load. It is not Bonneville's intent to resolve this disagreement in the attached contract. Rather, as indicated in section 7(c) of the attached contract, Bonneville's displacement actions are to be undertaken only subject to Bonneville's legal rights, legal obligations, and policies concerning displacement. When such policies are developed, the Industrial Purchasers will have the opportunity to participate in the policy development and, if dissatisfied by the result, to contest it. By executing the attached contract, no Industrial Purchaser will waive any right or claim with respect to this issue. [*]

This contract is the initial contract that Bonneville is required to offer each Industrial Purchaser pursuant to sections 5(d) (1) (B) and 5(g) of the Regional Act. As you know, the Act contemplates in section 5(d) (1) (B) additional, future contracts with each existing Industrial Purchaser, but [p.2] unlike this initial contract, such future contracts do not have the benefit of the statutorily deemed sufficiency of power available to the Administrator under section 5(g)(7). Bonneville's ability to offer any future contracts to its nonpreference customers, including the Industrial Purchasers, is therefore largely dependent upon Bonneville achieving firm load/resource balance while these initial contracts are in effect. Bonneville is aware that most, if not all, of the Industrial Purchasers are necessarily considering substantial new capital investment at their existing facilities during the period of the initial contracts, and that as a result the useful life of these facilities may be extended well beyond the 20-year term of the initial contracts. We hope you will find section 12 of the attached contract responsive to some of the concerns that have been expressed as to Bonneville's [sic] recognition of your need for future, as well as immediate, power planning

*This is the significant paragraph that Petitioners' omitted from their Appendix to the Petition for certiorari.

certainty. We would certainly expect future Bonneville officials to recognize this need as well. At the same time, Bonneville's obligation to maintain load/resource balance through the efforts of its Customers and other non-Federal entities, and the goal of achieving load/resource balance in making possible future contracts and a continuing program under the Regional Act, needs to be borne in mind by the Customers as well as by Bonneville.

Bonneville has recently conducted cash flow analyses that indicate that should there be substantial Industrial Purchaser curtailment below sales projected in designing Bonneville's 1981 wholesale power rates, Bonneville would experience severe cash flow difficulties, potentially of such a magnitude as to endanger Bonneville's ability to purchase necessary power. In the contract negotiations all parties recognized that Bonneville needs to minimize cash flow problems, and that consequently a method should be agreed upon for dealing with underrecoveries of costs incurred pursuant to section 5(c) of the Regional Act at intervals prior to July 1, 1985. Bonneville recognizes that this was not solved during the negotiation of the contract, however, our recent review of the potential cash flow problems convinces us that it is imperative to resolve this issue now.

Bonneville intends to resolve this problem in future years through policies of general applicability in its annual rate proceeding. One possible way to deal with the particular cash flow problem resulting from DSI curtailments would be, if a DSI reduced its Operating Demand upon notice prior to the beginning of the Contract Year pursuant to section 5(b) (4) of the new contract, Bonneville could reallocate the cost of exchange resources or reduce the amount of purchases it otherwise might have to make.

We believe that this resolution is consistent with the legal obligations imposed by section 7(b) (3) and section 7(c) (1) (A) of the Regional Act, and does not prejudice the right of

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any person or entity to present and to have considered any arguments or evidence it may wish to present in Bonneville's rate proceedings conducted pursuant to section 7 of the Regional Act. The following conditions will aid Bonneville's cash flow needs, and do not [p.3] establish or alter any ultimate legal obligation of the Industrial Purchasers under the Act for the payment of any particular costs. The firm offer contained in the enclosed contract, therefore, is conditioned upon the following:

If Bonneville determines after consultation with the Industrial Purchasers that: (1) in any month during the rate period total power sales to all Industrial Purchasers have fallen below 90 percent of the monthly projection of the total Industrial Purchaser load contained in Bonneville's 1981 wholesale power rate filing because of voluntary curtailments by Industrial Purchasers; (2) Bonneville projects significant cash flow problems as a result of such voluntary curtailments; and (3) Bonneville determines that it is unable to mitigate the shortfall in revenues resulting from such curtailments by selling energy made available because of such curtailment, reducing purchases or some other method, then Bonneville shall include in each Industrial Purchaser's next regular power bill the Purchaser's share of the shortfall resulting from such curtailments (less any savings realized by Bonneville's best efforts to mitigate the shortfall) based on the proportion of the Purchaser's projected Operating Demand to the total projected Operating Demands of all Industrial Purchasers executing new DSI Contracts, as contained in Bonneville's letter to your company dated August 14, 1981. This surcharge shall be superseded when Bonneville's wholesale power rates to the Industrial Purchasers provide for recovery of such shortfalls.

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Any amount paid by a Purchaser pursuant to this provision shall be credited to the Purchaser's benefit when Bonneville computes the amount that the Purchaser will pay or receive under section 7(b) (3) of the Regional Act.

Bonneville believes that the foregoing shortfall provision is necessary to assure operations consistent with sound business principles. The shortfall provisions will not be invoked unless volutary curtailment is greater than 10 percent and a significant cash flow difficulty arises. Even then, Bonneville will use its best efforts to mitigate any revenue shortfall by selling the curtailed power or displacing any purchases to the extent possible while still meeting Bonneville's contractual obligations.

I regret that this matter has arisen at this late date but we believe that our obligation to recover our costs requires that we condition the offer of the long term contract on this provision, recognizing that in the future, such potential revenue shortfalls will be dealt with in Bonneville's rate proceedings.

[p.4] If your Company finds the provisions of the contract and the above condition acceptable, please have the appropriate officials sign this contract and the copy of this letter and fill in the execution date of the contract on page 2. Please return one copy of each document to Bonneville and keep remaining copies for your files.

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Please contact our office if you have any questions.

Sincerely,

/S/ Peter T. Johnson

Administrator

Enclosures

Company Aluminum Company of America
Executed by /S/ R. Arnold Kramer
Title Executive Vice President

Company Northwest Alloys, Inc.
Executed by /S/ J. Reid Clark
Title Vice-President

NO. 82-1071

Office - Supreme Court, U.S.
FILED

OCT 11 1983

ALEXANDER L. STEVAS,
CLERK

In The Supreme Court

of the

United States

October Term, 1983

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Petitioners,

v.

Central Lincoln Peoples' Utility District, et al.,

Respondents.

On Writ of Certiorari
to the United States Court of Appeals
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**BRIEF FOR RESPONDENTS PORTLAND GENERAL ELECTRIC COMPANY, CP
NATIONAL CORPORATION, PACIFIC POWER & LIGHT COMPANY, PUGET
SOUND POWER & LIGHT COMPANY, MONTANA POWER COMPANY, AND
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QUESTION PRESENTED

Whether the longstanding priorities utilized by the Bonneville Power Administration (BPA) to market nonfirm federal power were altered by enactment of the Pacific Northwest Electric Power Planning and Conservation Act (Regional Act)?¹

¹ This is not a new issue raised for the first time in this Court. Investor-owned utilities asserted during contract negotiations that the Regional Act did not require BPA to alter its existing policy for marketing nonfirm power. [Contract Official Record of BPA's negotiation of DSI contracts, COR 8451] The public utilities took this position in their initial brief to the Ninth Circuit. [*Preference Customer Memorandum*, at 29]

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In The Supreme Court
of the
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October Term, 1983

Aluminum Company of America, et al.,
Petitioners,

v.

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Respondents.

On Writ of Certiorari
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for the Ninth Circuit

**BRIEF FOR RESPONDENTS PORTLAND GENERAL ELECTRIC COMPANY, CP
NATIONAL CORPORATION, PACIFIC POWER & LIGHT COMPANY, PUGET
SOUND POWER & LIGHT COMPANY, MONTANA POWER COMPANY, AND
IDAHO POWER COMPANY**

STATEMENT OF THE CASE

Respondents Portland General Electric Company, CP National Corporation, Pacific Power & Light Company, Puget Sound Power & Light Company, Montana Power Company, and Idaho Power Company (hereinafter "investor-owned utilities")^{1,5} generally concur in the historical facts presented in Federal Respondents' brief. However, the investor-owned utilities do not agree with the construction of the Regional Act urged by Federal Respondents or Petitioners in their Statement of the Case. Nor do the investor-owned utilities agree that nonfirm power was arbitrated by preference utilities to utilities outside the Pacific Northwest prior to passage of the Project Act.² The impact of BPA's decision upon investor-owned utilities' interests, operations, or ratepayers is not described in Petitioners' brief or made a part of the administrative record.

1. Background

Respondents investor-owned utilities serve over two million customers. Though they own or purchase from nonfederal sources much of their power supplies, they traditionally have acquired large amounts of power from BPA. The obligation of BPA to supply federal power to investor-owned utilities was confirmed by the Regional Act.³

^{1,5} Subsidiaries and affiliates of investor-owned utilities are: *Portland General Electric Company*: Northwest Energy Services Company, Pacific Northwest Power Company; *CP National Corporation*: Cogeneration National Corp., Buckeye Supply West; *Pacific Power & Light Company*: Pacific Telecom, Inc. (subsidiary of PP&L holds majority of voting stock); *Puget Sound Power & Light Company*: Cascade Geothermal Development Venture, Renton Village Company, Northwest Energy Services Company.

² Petitioners cite the Joint Appendix (hereinafter "J.A.") at page 29 as support for this conclusion. Brief of Pet., pp. 12-13, n. 30. An examination of the referenced document reveals that it was BPA's policy, after all regional loads were met and water could not be considered for later use in the region, to offer surplus power for sale to the Pacific Southwest over the California Intertie. *Id.* The proposition that nonfirm power was arbitrated by preference utilities is not supported by any of the citations or references made by petitioners.

³ See, e.g., 16 U.S.C. § 839c(b)(1).

BPA has contracts with investor-owned utilities to supply power and transmission services. The agreements require generating facilities of both parties to be operated in an economically efficient manner. Because of the physical and contractual relationships among utilities and BPA, investor-owned utilities have a substantial financial interest in the planning and operation of the federal system. They actively participate in all regional processes which significantly may affect the capability of their systems or the federal system to supply power.

2. Nonfirm Energy Purchases From BPA

Investor-owned utilities have use for and historically have purchased nonfirm energy⁴ from BPA. Prior to enactment of the Regional Act, BPA interpreted its statutory directives to require the allocation of nonfirm power as follows:

"Nonfirm energy is available when there is more than enough water in Federal reservoirs to meet the Federal system's firm energy commitment. The current secondary sales policy calls for the following priorities in the allocation of any secondary energy: (1) All firm energy loads will be served if any are not being met. This includes the bottom three quartiles of the direct-service industrial (DSI) load; (2) new reservoirs will be filled or depleted reservoirs restored; (3) public agencies' secondary power demands will be met, allowing them to refill their own reservoirs or displace thermal generation currently being used to serve their own loads; (4) when not all secondary demands can be met, the remaining energy is split approximately equally between the private utilities and the direct-service industries of the region; (5) after the top quartile of the DSI loads has been met, private utilities in the region can then purchase secondary energy to displace any of their remaining thermal

⁴ Nonfirm energy is the energy in excess of that which BPA can reliably plan on producing. It is provided only when water level in the Northwest is greater than that which is deemed critical. BPA plans on having at least the amount of power that it can produce at critical water level and that power is therefore firm power. *Central Lincoln Peoples' Utility Dist. v. Johnson*, 686 F.2d 708, 710 n. 1 (9th Cir. 1982).

generation which they have declared necessary for meeting firm loads under the Pacific Northwest Coordination Agreement; and (6) after all applicable regional loads have been met, and water cannot be considered for later use in the region, surplus power is made available for sale to the Pacific Southwest over the California Intertie.⁵

This longstanding agency marketing policy afforded equal treatment to investor-owned utilities' and DSIs' requests for nonfirm power.

Immediately after passage of the Regional Act, BPA's management construed the new statutes to require elevation of DSI applications for nonfirm power [items (4) and (5) of the quoted policy, *supra*] above not only investor-owned utilities' but also public agencies' rights.⁶ Hence, DSIs were deemed first in line for nonfirm energy, public agencies second, and investor-owned utilities third. This change deprives investor-owned utilities of the opportunity to buy nonfirm energy under many operating conditions. The Ninth Circuit refused to accept BPA's belief that Congress committed increased service to the DSIs, and in effect reinstated the marketing priorities which preexisted the Regional Act.⁷

⁵ BPA, U.S. Department of Energy, *Final Environmental Impact Statement on the Role of the Bonneville Power Administration in the Pacific Northwest Power Supply System* (hereinafter "EIS"), p. IV-71 (December 1980); J.A. 29.

⁶ COR 254. Documents from BPA's administrative record are cited to the page in the Contract Official Record (COR) at which they appear.

⁷ If, as the DSIs and government contend, the power was intended for and "committed" by Congress to the DSIs, then this ends the Court's inquiry. Investor-owned utilities and their customers will suffer the economic consequences of limited access to inexpensive federal power through such an allocation until such time as investor-owned utilities' claims to federal power are fully litigated and a record developed which demonstrates the economic impact. However, if the power was not "committed" by Congress to the DSIs, then it remains as nonfirm power, the priorities of which were not established or, more importantly, altered in the Regional Act.

3. Investor-Owned Utilities' Position During Negotiation Of New DSI Contracts

Investor-owned utilities participated in the negotiations resulting in the challenged DSI contracts. Vigorous opposition was aimed at the provisions concerning enhanced service to the DSI first quartile. The position of investor-owned utilities was expressed in the following manner:

"[T]he prototype contract goes far beyond the requirements of any reasonable reading of the Act and attendant congressional reports in providing for enhanced availability of service to DSI top quartile.

• • • • •

"We have yet to find any statement to Congress or by a member of Congress indicating any intent to add the equivalent of nearly 1,000 megawatts of firm load to the Pacific Northwest. Surely, a matter of such magnitude would have been discussed and debated at length before Congress."⁸

It was also submitted that "any increased commitment on BPA's part to serve the top quartile of DSI loads will require a change in BPA's marketing policy for nonfirm energy."⁹

4. Investor-Owned Utilities' Participation In Proceedings Below

Investor-owned utilities intervened in this suit and were aligned with the public agencies by the court. Like the public agencies, the utilities have a direct interest as competitors for the power which the DSIs and federal government contend was committed to the DSIs. However, investor-owned utilities do not seek an abstract or general inquiry into the role of preference in the Bonneville Project Act (16 U.S.C. § 832c(a), et al.) and Regional Act; the factual administrative record necessary for such interpretation is absent. It is evident from the record that the dispute between the public agencies, BPA and the DSIs can be resolved by resort to the statutory language and longstanding administrative applications.

⁸ COR 8451

⁹ *Id.*

SUMMARY OF ARGUMENT

Investor-owned utilities submit that while the result reached by the Ninth Circuit was correct, the facts that would enable the Court to base its decision on the preference clause¹⁰ are absent. The Court should confine its review to the question of whether the Regional Act requires BPA to change the priority given to DSIs' requests for power.

Prior to enactment of the Regional Act, public agency requests for nonfirm power were given preference; if nonfirm energy remained, it was allocated evenly between investor-owned utilities and DSIs. Congress was aware of this marketing scheme and is deemed to have adopted it as a part of the Regional Act, absent explicit language to the contrary. BPA's position during contractual negotiations of new DSI contracts reflected a misinterpretation of the statutes. Although entitled to deference, BPA's implementation of the Regional Act need not be accepted. The decision of the Court of Appeals should be modified, but affirmed.

ARGUMENT

1. The Result Reached by the Ninth Circuit was Correct, but the Scope of its Decision Should be Limited.

The Ninth Circuit held that BPA's interpretation of the Regional Act was incorrect *and* was inconsistent with the preference requirements of 16 U.S.C. § 839g(c). *Central Lincoln Peoples' Utility Dist. v. Johnson*, 686 F. 2d 708, 711 (9th Cir. 1982). Although investor-owned utilities agree that the Regional Act was misconstrued by BPA, the court should have limited its holding to this finding. There was an inadequate basis for its decision that the preference clause was violated.

a. Judicial Restraint

The court below should not have considered in the abstract whether the preference clause applied generally to power sale

¹⁰ 16 U.S.C. § 832c(a), incorporated by reference into the Regional Act in 16 U.S.C. § 839c(a). *See also*, 16 U.S.C. § 839g(c).

transactions involving nonfirm energy. The following were not subjected to an administrative analysis by BPA, and hence were not before the court of appeals:¹¹

- BPA contracts with public agencies for nonfirm power.
- Amounts of nonfirm power historically sold to public agencies.
- BPA contracts for nonfirm power with investor-owned utilities.
- Amounts of nonfirm power historically purchased by investor-owned utilities.
- Amounts of nonfirm power historically purchased by persons not before the court.
- The effects BPA's decision to elevate DSI requests for nonfirm power had upon not only all of the above, but also upon the customers of public agencies, investor-owned utilities, and those persons not parties to this suit.¹²

A proper inquiry would require knowledge of not only the foregoing subjects but also an understanding of the potential impacts upon the federal power system in the Northwest. A regional approach to consideration of nonfirm power would be consistent with the regional approach to energy planning reflected in the Regional Act; it would recognize the operational realities of an interrelated system of electric power

¹¹ The record herein does not consist of evidence adduced in a judicial setting. Rather, it is comprised of transcribed views of persons interested in the new DSI contracts, BPA's summary and analysis thereof, BPA's interpretations and descriptions of how nonfirm energy was allocated before the Regional Act, and the challenged contractual terms.

¹² The barrenness of the factual record is amplified by reference to federal respondents' brief. It is stated, for the proposition that the DSI contracts would support the policies of the Regional Act, that "[i]ndeed, in the first year (fiscal 1982) following passage of the Regional Act, the net cash benefit of this exchange to the IOUs' [investor-owned utilities'] residential customers was \$216,592,967. This same figure, of course, represents the amount of loss BPA incurred in the exchange. When these costs are projected over the life of the DSIs' 20-year contracts, BPA estimates an aggregate cost of \$10 billion." There is no citation supporting this assertion, and hence could not have been considered by the court; nor should it be considered by this Court. (Brief of Fed. Resp. at 19.)

generation, transmission and distribution. Investor-owned utilities sought but were denied such an inquiry at the administrative level.^{12.5}

This proposition simply reflects ordinary principles of justiciability which call for judicial avoidance of complicated issues not fully before the court:

"... Such opinions, such advance expressions of legal judgment upon issues which remain unfocused because they are not pressed before the Court with that clear concreteness provided when a question emerges precisely framed and necessary for decision from a clash of adversary argument exploring every aspect of a multifaced situation embracing conflicting and demanding interests, we have consistently refused to give."

United States v. Fruehauf, 365 U.S. 146, 157 (1961). See generally, 13 Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction* § 3529 (1975).¹³

An examination of the parties' claims and the limited record exhibits the complexity and elusiveness of the operation of BPA's hydroelectric system in the Pacific Northwest. Dealing with the implications of preference rights, and the numerous competing legislative concerns, without a comprehensive evidentiary framework invites error and long-term prejudice to the efficient operation of the Northwest's hydroelectric resources.

^{12.5} "If BPA is determined to provide increased service to the top quartile, however, it must consider carefully not only the limits of prudent operation, but the equities of distributing the costs of increased service to the DSIs. The first two commitments described above will provide major benefits to the DSIs at the expense of the retail customers of both public agencies and investor owned utilities. Before proceeding with these two steps, BPA should prepare a careful analysis of the distribution of costs so that the Region can see and understand the economic implications of the proposed DSI contract." COR 8451.

¹³ See also, *FCC v. Pacifica Foundation*, 438 U.S. 726, 734-35, *reh'g denied*, 439 U.S. 883 (1978) (decision of administrative agency must be reviewed only in terms of the actual decision without reaching out to the broader statutory implications).

The public agencies do not seek a decision as to the general effect of preference upon nonfirm energy sales in the Northwest. Rather, a limited contract interpretation is sought: whether provisions of the proposed DSI contracts violated public agencies' recognized priority rights to nonfirm power.

b. Preference Decisions

The conclusion that a ruling upon the effect to be given statutory preference clauses is proper only when all relevant regional facts have been developed is buttressed by reference to cases that have construed other such clauses. In *City of Santa Clara, Cal. v. Andrus*, 572 F. 2d 660 (9th Cir.), cert. denied, 439 U.S. 859 (1978), the court inspected a federal power marketing agency's complicated energy "banking" agreement with a private utility which allegedly violated a public utility's preference rights.

Contractual relationships of all customers and the federal agency were known to the court. Evidence of historical power sales, including the amounts of power sold to all affected parties was fully developed. Components and the operation of the federal system also were known. The impact of the agency's decision upon the complaining party and other customers was precisely defined. On this record, the court found that the terms of the preference provisions were violated by the "banking" sales to the non-preference utility.

However, the court stopped short of a broad holding on contract validity:

"... The issue of the CVP's efficiency for irrigation purposes, and the likely impact of the present marketing scheme, or of Santa Clara's attack upon it, on that efficiency, were not addressed by any of the parties in their moving papers upon which the trial court rendered its decision.

"In light of the paucity of information adduced on this key issue, we are loathe to hold the sale of power to PG&E at Santa Clara's expense flatly invalid. It is conceivable that

the Secretary's decision to favor PG&E over Santa Clara in the marketing of CVP power could be justified as a measure designed to maximize the project's efficiency for its primary purpose, which is irrigation." 572 F. 2d at 672.¹⁴

City of Anaheim, Cal. v. Duncan, 658 F. 2d 1326 (9th Cir. 1981) illustrates not only that plenary factual development is necessary to resolve preference issues but also that the applicability of federal priority provisions is uniquely tied to particular fact situations. "Interim power"¹⁵ sales to private utilities rather than to public agencies were upheld. The precise power demands, facilities, and all relevant communications and transactions between affected parties served as the foundation for the opinion.¹⁶

¹⁴ See also, *Arizona Power Pooling Ass'n v. Morton*, 427 F. 2d 721, 723 (9th Cir. 1975), cert. denied sub nom., *Arizona Public Service Co. v. Arizona Power Pooling Ass'n*, 425 U.S. 911 (1976) (court declines to resolve issues regarding effect of preference clause due to lack of adequate information).

¹⁵ The term "interim power" used in the case does not refer to secondary, nonfirm power, which is at issue herein. The term denoted a block of federal power available from 1974 to 1980. 658 F.2d at 1328. See *Arizona Power Pooling Ass'n v. Morton*, 527 F.2d at 725.

The court in *City of Anaheim, Cal. v. Duncan* found that had power sales contracts with private utilities not been entered into, the power plant could not have been constructed. Reasoning the preference clause did not require an "absurd" result, the court rejected the public bodies' challenge to the contracts. *City of Anaheim, Cal. v. Duncan*, 658 F. 2d at 1330.

¹⁶ Exact details of contractual terms and the historical relationship between preference utilities and the TVA, as well as the economic consequences of the decision upon other customers were before the court in *Volunteer Electric Coop. v. Tennessee Valley Authority*, 139 F. Supp. 22 (E.D. Tenn. 1954), *aff'd*, 231 F.2d 446 (6th Cir. 1956). There a public utility urged that direct sales by TVA to a local industry violated its preference rights. The utility desired to purchase TVA power and then sell it at a profit to the industry directly served by TVA. Because of the economic benefit to TVA's customers as a whole, the court refused to strictly enforce a preference clause when doing so would be in derogation of an express statement of congressional intent. 139 F. Supp. at 26. *Volunteer* does not support the result urged by petitioners. It is distinguishable in terms of the statutes involved and, more importantly, by the narrow limits of the essence of the ruling: the preference clause does not require power to be indirectly sold to a private customer so that a public utility can make a profit when express statutory language authorizes a direct sale to the private customer.

The court of appeals' finding that BPA's actions violated the preference clause represents an abstract conclusion. The broad operation of the preference clause with respect to the marketing of nonfirm energy in the Northwest region should be addressed in some other proceeding. See *Coffman v. Breeze Corps.*, 323 U.S. 316, 323-24 (1945).

2. The Ninth Circuit Properly Ruled that No Change in the Allocation of Nonfirm Power was Directed in the Regional Act.

a. Background

Six days after the Regional Act became effective, a high-level BPA official met with the DSIs and stated orally the agency's interpretation of its new service commitment to the DSIs:¹⁷ that Congress transformed the DSIs' previous rights to nonfirm power, shared equally with investor-owned utilities and subordinate to public agency entitlements, into statutorily endorsed allocations of firm-like power.¹⁸ This official acknowledged at the time that investor-owned utilities were not all informed of the intended change in priorities or the reasons for the change. Furthermore, until commencement of this case, BPA's announced reasons for the change were consistently based upon regional energy deficits.¹⁹

¹⁷ COR 258.

¹⁸ J.A. 107 to 110.

¹⁹ That is, investor-owned utilities would be placing firm power supply obligations on BPA which could contribute to deficit. COR 264. BPA later argued that this deficit had not been foreseen by Congress, in fact that it was a changed circumstance justifying a departure from what BPA had told Congress about how the rate provisions of the Act would work.

"I find that Appendix B [Senate Committee on Energy and Natural Resources, Pacific Northwest Electric Power Planning and Conservation Act, S. Rep. No. 272, 96th Cong., 1st Sess. (1979); Cert. A., at F-69] tends to create an ambiguity when read with the other legislative history as to the assignment to new resources and secondly, the light [sic] of the Senate Energy Committee's caveats as to its use and the subsequent change in circumstances (including IOU load growth sales in the early years of the Act) is simply not a reliable indicator of congressional intent in view of today's circumstances."

Negotiations subsequently commenced on the new contracts. BPA negotiators would not discuss whether a change in priorities was required by the Regional Act; change was imposed on the negotiations. Negotiations instead focused upon the exact contract language to be used to describe the commitment which BPA and the DSIs read into the law. Investor-owned utilities asserted their understanding of the new law, that the Regional Act was intended "...to preserve the basic structure of DSI service, wherein one quarter of the demand is to be interruptible at the sole discretion of the Administrator."²⁰ This analysis was given no weight.²¹

There is no dispute among the parties that the manner in which BPA marketed nonfirm power after the Regional Act was inconsistent with its prior ministrations.

b. By Incorporating the Bonneville Project Act, Congress Intended BPA's Interpretation Thereof to be Retained.

Prior to the Regional Act, BPA marketed federal power in accordance with several statutes, including the Bonneville Project Act of 1937.²² The Project Act contains a preference clause which commands that "...the administrator shall at all times, in disposing of electric energy generated at said project, give preference and priority to public bodies and cooperatives."²³ Adhering to its dictates, BPA met the firm energy loads of its customers. Nonfirm, or secondary power, was then provided on request and as available to public agencies. If surplus power existed which exceeded the agencies' needs, it was distributed equally between investor-owned utilities and DSIs.²⁴

BPA, *Administrator's Record of Decision, 1981 Transmission Rate Proposal, 1981 Wholesale Power Rate Proposal*, V1 to V12 (June, 1981).

²⁰ COR 6932.

²¹ COR 6933.

²² 16 U.S.C. § 832, et. seq. See also, 16 U.S.C. § 825 et seq. (Flood Control Act of 1944); 16 U.S.C. § 838 (Columbia River Transmission System Act).

²³ 16 U.S.C. § 832(c).

²⁴ EIS, IV-71 (J.A. 29).

Congress expressly incorporated the preference and priority provisions of the Project Act into the Regional Act.²⁵ By so doing, BPA's interpretation of the Project Act, which required public agency demands for nonfirm power to be accorded priority to DSI load demands, became the will of Congress.

"Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change, see *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 414n.8, 45 L. Ed. 2d 280, 95 S. Ct. 2362 (1975); *NLRB v. Gullett Gin Co.*, 340 U.S. 361, 366, 95 L. Ed. 337, 71 S. Ct. 337 (1951); *National Lead Co. v. United States*, 252 U.S. 140, 147, 64 L. Ed. 496, 40 S. Ct. 237 (1920); 2A C. Sands, *Sutherland, Statutory Construction* § 49.09 and cases cited (4th ed. 1973). So too, where, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute." *Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978).²⁶

Because there was no express statement of congressional intent to repudiate BPA's construction of the Project Act, BPA's new DSI contracts violated the terms of the Regional Act. See *Haig v. Agee*, 453 U.S. 280, 300 (1981) and *NLRB v. Hendricks Cty. Rural Electric Membership Corp.*, 454 U.S. 170, 177 (1981).²⁷

²⁵ 16 U.S.C. § 839c(a). Indeed, the Project Act and other statutes referenced in n. 22, *supra*, were not repealed by the Regional Act but continued to govern BPA's marketing responsibilities in numerous important respects.

²⁶ Great weight should be accorded a longstanding interpretation placed on a statute by an agency charged with its administration. This is especially so where Congress has re-enacted the statute without pertinent change. *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 275 (1975). See *Hillsboro National Bank v. Commissioner*, ___ U.S. ___, 103 S. Ct. 1134, 75 L. Ed. 2d 130 (1983).

²⁷ The legislative history of the Regional Act evinces no clear indication nonfirm power demands of public agency customers should be subjugated to DSIs' demands. To the contrary, the history is replete with indicia that the longstanding rights should be undisturbed. See, e.g. House Committee

c. Congress' Inclusion of Terms Previously Used by BPA to Define the Power DSIs Were to Receive Evinces Intent Not to Modify the Priorities Preexisting the Regional Act.

BPA's position, and that of the DSIs and Federal respondents herein, that the Regional Act requires the DSIs' top-quartile of power requirements to be treated as firm rests upon the following construction of the Regional Act:

- (1) 16 U.S.C. § 839c(g)(1) requires BPA to offer contracts to DSIs;
- (2) 16 U.S.C. § 839c(d)(1)(B) requires BPA to supply each DSI with a specified "amount of power" sufficient for its full load;
- (3) 16 U.S.C. §§ 839c(d)(1)(A) and 839a(17) authorize BPA to restrict DSI power when needed to protect BPA's "firm loads" from shortages, but not for any other purpose; and
- (4) 16 U.S.C. § 839c(f) prohibits BPA from selling any power — firm or nonfirm — until all obligations under the initial mandated contracts have been met.²⁸

The Ninth Circuit found this reasoning to be "flawed" representing an unreasonable perception of the statutes.²⁹

on Interstate and Foreign Commerce, Pacific Northwest Electric Power Planning and Conservation Act, H.R. Rep. No. 976 (I), 96th Cong., 2d Sess. (1980) ("House Report") [Cert. A., at D-76, D-78]. The following statement is especially telling on the arguments of the DSIs and the government: "...One intended result of these procedures is that there will be no increase in firm power commitments to the direct service industrial customs [sic], except for technological improvements purposes." Senate Committee on Energy and Natural Resources, Pacific Northwest Electric Power Planning and Conservation Act, S. Rep. No. 272, 96th Cong., 1st Sess. (1979) [Cert. A., at F-57].

The court below observed ambiguity in the legislative history regarding treatment of the DSI first quartile. *Central Lincoln Peoples' Utility Dist. v. Johnson*, 686 F.2d 708, 713 n. 7 (9th Cir. 1982). This Court has refused to implement an administrative construction which conflicted with an earlier position when legislative history was found to be ambiguous. See *Watt v. Alaska*, 451 U.S. 259 (1981).

²⁸ COR 2694-2695 (J.A. 100-101); Brief of Pet., at 23-24.

²⁹ *Central Lincoln Peoples' Utility Dist. v. Johnson*, 686 F.2d at 712-15.

16 U.S.C. § 839c(d)(1)(B) provides:

"After December 5, 1980, the Administrator shall offer in accordance with subsection (g) of this section to each existing direct service industrial customer an initial long-term contract that provides such customer an amount of power equivalent to that which such customer is entitled under its contract dated January or April 1975 providing for the sale of 'industrial firm power.'" (emphasis supplied)³⁰

BPA explained the quantity and quality of the power to be supplied to DSIs in their 1975 contracts, expressly referred to in § 839c(d)(1)(B), in the following manner before passage of the Regional Act:

"Power Sales Contracts

(a) Industrial Firm Power

Industrial firm power (IF) agreements provide Bonneville with several different restriction rights which provide certain specified reserves. While each kilowatt of the DSI contract demand is subject to the different types of reserves provided by Bonneville's restriction rights, the IF agreements divide the DSI contract demand into quartiles for ease of administration. Each quartile has different conditions under which service can be interrupted to provide reserves to Bonneville.

Top quartile: at any time for any period for any reason. BPA will give as much notice as possible.

This quartile is served from secondary energy available only on an intermittent basis and is frequently interrupted. When prudent operation dictates the top quartile of the IF load to be interrupted to ensure service to BPA firm loads, BPA will frequently make available Advance Energy..."³¹

³⁰ The DSIs and government contend the power commitment to DSIs has two components, power quantity and power quality. It is argued that power quantity refers to the number of kilowatts DSIs are entitled to. DSIs submit that respondents did not challenge this component in the court of appeals, but instead took issue with power quality. The DSIs', and BPA's, position is that the quality of DSI power is upgraded by the Regional Act so as to be interruptible only for firm power loads. (Brief of Pet., at 24-25.)

³¹ EIS, IV-84 (J.A. 31)

"Industrial Firm Power"

As part of our 1974 rate review we started early in 1972 discussing with our industrial customers rate schedules and general rate schedule provisions for a lower grade of power than they were receiving...

After numerous meetings with our industrial customers, we arrived at what we call Industrial Firm Power. This grade of power is quite different than power sold by any other utility, any place. Each kilowatt of the Industrial Firm Power has the following characteristics:

- (1) One-fourth of the contract demand can be restricted by BPA at any time.

• • • • •

With a lower grade of power to industry, the reserves are used for productive purposes and are not idle until needed to meet firm loads..."³²

An examination of these excerpts indicates BPA did *not* consider quantity and quality to be separable concepts. Rather, both were indispensable in defining the "amount of power" DSIs could receive.³³ The phrase "industrial firm power" was included explicitly by Congress in § 839c(d)(1)(B) to define the "amount of power" allocated. Congress is presumed to know the construction placed upon this phrase by BPA, and is deemed to have adopted this construction. *CF. Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978). *See also, Haig v. Agee*, 453 U.S. 280, 300 (1981).³⁴

³² Bernard Goldhammer Memorandum (J.A. at 37, 43, 46-47). The subject of the memorandum was the 1975 contracts with DSIs.

³³ "This latter term ['industrial firm power'] does not define one particular grade of power. Rather, it denotes a new method or structure for distributing power to industry." *Port of Astoria, Oregon v. Hodel*, 595 F.2d 467, 472 (9th Cir. 1979).

³⁴ The legislative history supports this conclusion. The House Report [Cert. A., at D-122 to D-123] specifically includes the term "industrial firm power" in describing the amount of power DSIs should be afforded. Longstanding formulas employed by administrative agencies to allocate federal resources should not be modified absent specific direction from Congress. *See Watt v. Alaska*, 451 U.S. 259, 271 n. 13 (1981).

Furthermore, the language of § 839c(d)(1)(B), providing that sales to DSIs shall provide a portion of BPA's reserves for firm power loads, does not exhibit an intent to bestow DSIs' top quartile loads with immunity from interruption except when necessary to meet BPA's other firm loads. Contractual commitments to DSIs, with their unique interruptibility features, have provided a portion of BPA's reserves for firm power loads for many years.³⁵ The statutory language on its face directs BPA to continue to utilize DSI commitments as a portion of the reserves for its firm loads, in recognition and affirmance of past practices.³⁶ Had Congress intended that DSI service could be interrupted *only* for firm loads in the region, § 839c(d)(1)(A) easily could have been rewritten to state "sales to DSIs shall be interrupted only for firm power loads." See *North Haven Board of Education v. Bell*, 456 U.S. 512, 521 (1982).³⁷ As an administrative practice in effect before the Regional Act, of which Congress was aware and incorporated into the legislation, the Court should give force to the longstanding practice. Cf. *Lorillard v. Pons*, *supra*, and *Haig v. Agee*, *supra*.³⁸

³⁵ *Port of Astoria, Oregon v. Hodel*, 595 F.2d 467, 472 (9th Cir. 1979). BPA's announcements also disclose the historic and well-established use of DSI loads as reserves for BPA's other firm power loads. See e.g., EIS, at IV-84 (J.A. 31); Bernard Goldhammer Memorandum (J.A. 46).

³⁶ "The Committee amendment specifically authorizes the Administrator to enter into new contracts with these direct service industries. These contracts will provide power in amounts equal to, but not greater than, that which these companies are now entitled under existing contracts with BPA, and *the terms of these contracts will require that these companies continue to supply reserves for the region.*" (emphasis supplied) House Report, Cert. A., at D-69.

³⁷ 16 U.S.C. § 839a(17) promotes the same result. Reserves are defined as the electric power needed to avert shortages for the benefit of firm power customers. As noted, DSI loads have operated as reserves for firm power customers. The operational word of the provision is "customers": Congress could have readily revised the subsection to define reserves as power needed to protect the *customers' firm loads*. Had such sentence structure been used, the DSIs' and government's arguments would be entitled to more weight.

³⁸ It was correctly concluded by the Ninth Circuit that while deference was due to BPA's construction of the new act, BPA's views of the statutes were not controlling. This Court has stated:

CONCLUSION

The decision of the Ninth Circuit should be modified, but affirmed.

Dated: October 6, 1983

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"We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."

General Electric Co. v. Gilbert, 429 U.S. 125, 141-42 (1976), *reh'g denied* 429 U.S. 1079 (1977), *quoting Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). *See also, Watt v. Alaska*, 451 U.S. 259, 273 (1981).

Under these criteria, BPA's actions fare poorly. As previously discussed, its ruling was inconsistent with prior interpretations and unsupported by the terms of the Regional Act and its legislative history. Lack of thoroughness is exhibited by BPA's failure to address and answer the impacts of its statutory construction in these substantive areas:

- (1) DSI contract demand in agreements that preceded the Regional Act totaled approximately 3600 megawatts (hereinafter "MW"). Under the contracts here in issue BPA has committed to supply DSIs with approximately 3800 MW of electric energy. (Table, J.A. 20.) Prior to the Regional Act, BPA divided this demand into fourths, or quartiles, each quartile having various interruptibility characteristics. (EIS, J.A. 31-34.) The Top Quartile, approximately 900 MW of power, was interruptible at any time, allocated from nonfirm power, and was available on an equal basis with investor-owned utilities. (EIS, J.A. 29, 31.)

In the new contracts, the Top Quartile, now approximately 950 MW, was transformed into firm power, and deemed superior to claims of public agency and investor-owned utilities to nonfirm power. Under BPA's determination, the federal system must be operated to provide an additional 1000 MW; before, it was discretionary whether the system should be operated to meet this load. Inadequate consideration was given by BPA of the effect on system resources and potential long-term impact such operation would cause.

- (2) Traditionally, investor-owned utilities could rely on BPA's ability to supply power in years when the water level was more than critical. Hence, after firm loads were met, inexpensive nonfirm federal power was available for its customers. If 1000 MW of nonfirm power remained after meeting firm and public agency demands, investor-owned utilities had access to 500 MW of power as did DSIs. However, under its new mandate, investor-owned utilities can no longer rely on BPA. Only if there is in excess of 1000 MW over the historical critical level will investor-owned utilities be able to purchase federal power. The result is more reliance on relatively expensive thermally generated power. Because investor-owned utilities are required by law to meet their customers' needs, construction of thermal power plants could be indicated. BPA failed to give due consideration to these likely, expensive economic consequences to ratepayers of investor-owned utilities, as well as the economic impact on customers of public agencies.
- (3) There is no rectification of BPA's approach with the portions of the Regional Act directing service to investor-owned utilities. Investor-owned utilities, like DSIs, were allocated rights to purchase power under the Regional Act. See, e.g., 16 U.S.C. §§ 839c(b)(1) and (g)(1). Yet BPA's new DSI contracts at the very least interfere with BPA's ability to perform as directed.
- (4) One major purpose of the Regional Act, largely ignored by the DSIs and the government in their arguments, was to encourage conserva-

tion and development of renewable resources within the Pacific Northwest. 16 U.S.C. § 839. BPA was instructed to implement this purpose, and to encourage DSIs to develop methods to promote its furtherance. 16 U.S.C. § 839b(e)(4). Yet BPA's treatment of DSIs frustrates this strong statement by Congress. It is unreasonable to conclude that federal power resources would be conserved by placing an additional firm burden of 1000 MW thereupon. Nor are DSIs encouraged to explore conservation or techniques to reduce their demand on the federal system: DSIs' power needs would be completely met. Affirming the ruling of the Ninth Circuit would promote Congress's explicit statement. Because one-fourth of the DSIs' power requirements are uncertain, incentives exist for DSIs to explore conservation and renewable technologies to assure continued operation of their businesses.

NO. 82-1071

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ALEXANDER L. STEVAS,
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In The Supreme Court

of the

United States

October Term, 1983

ALUMINUM COMPANY OF AMERICA, et al.,
Petitioners,

v.

CENTRAL LINCOLN PEOPLES' UTILITY DISTRICT, et al.,
Respondents,

and

PETER JOHNSON, as Administrator of the BONNEVILLE
POWER ADMINISTRATION, Department of Energy,
and DONALD PAUL HODEL, as Secretary of the
DEPARTMENT OF ENERGY, and the
UNITED STATES OF AMERICA,
Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF OF RESPONDENT PUBLIC POWER COUNCIL

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QUESTION PRESENTED

Did the Ninth Circuit correctly construe the Pacific Northwest Electric Power Planning and Conservation Act ("the Regional Act") as requiring the Bonneville Power Administration to observe longstanding statutory priorities in the sale of nonfirm energy?

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| BPA, U.S. Department of Energy, Final Environmental Impact Statement on the Role of the Bonneville Power Administration in the Pacific Northwest Power Supply System ("Role EIS") (DOE/EIS — 0066) (Dec. 1980) | 6, 10, 11, 22 |

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October Term, 1983

ALUMINUM COMPANY OF AMERICA, et al.,
Petitioners,

v.

CENTRAL LINCOLN PEOPLES' UTILITY DISTRICT, et al.,
Respondents,

and

PETER JOHNSON, as Administrator of the BONNEVILLE
POWER ADMINISTRATION, Department of Energy,
and DONALD PAUL HODEL, as Secretary of the
DEPARTMENT OF ENERGY, and the
UNITED STATES OF AMERICA,
Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF OF RESPONDENT PUBLIC POWER COUNCIL

STATEMENT OF THE CASE

The Public Power Council adopts the Statement of the Case as set out in the Brief of Respondents Central Lincoln Peoples' Utility District, *et al.*, and hereby incorporates that Statement by reference.

SUMMARY OF ARGUMENT

The preference rights of consumer-owned utilities in the marketing of federal power are established by the Bonneville Project Act and reaffirmed by the Regional Act. The preference clause is a recognition that publicly owned resources belong to the nation's people and should be distributed directly to the public wherever it is possible to do so. Preference has always been the cornerstone of the federal power marketing system in the Pacific Northwest, and the Regional Act explicitly continues preference for all BPA sales. BPA's decision to grant the direct service industries first access to nonfirm energy is an unreasonable interpretation of the Regional Act because it denies the preference customers' right of priority access to nonfirm energy sales.

The legislative history of the Regional Act is equally clear on the reaffirmance of preference. However, the legislative history relied on by BPA and the DSIs to disgorge the preference customers of their rights is ambiguous and unreliable. Therefore, since the language of the statute is clear and the legislative history supports the reaffirmance of preference, it was reasonable for the lower court to conclude that BPA's sales of nonfirm energy first to the direct service industries violated Congress' intent to preserve preference under the Regional Act.

This court should uphold the express rights of preference agencies by affirming the decision below. The Ninth Circuit has interpreted preference consistently with the rulings of other courts regarding similar preference provisions under Federal law. In light of the strong Congressional policy in favor of the preference clause, and of the vital role which preference plays in spreading the benefits of publicly owned facilities to public entities, it is reasonable to conclude that,

had Congress intended to abrogate the preference rights of public agencies, it would have done so expressly instead of in an ambiguous portion of legislative history. Such a drastic change in Congressional policy requires explicit Congressional direction.

ARGUMENT

I.

RESPONDENT PUBLIC POWER COUNCIL IS IN A UNIQUE POSITION TO COMMENT ON THE PURPOSE AND EFFECT OF THE REGIONAL ACT.

A. The Public Power Council Represents the Common Interests of the Pacific Northwest's Consumer-Owned Utilities.

The Public Power Council was formed in 1966 to represent the common interests of the Pacific Northwest's consumer-owned electric utilities on power supply, planning and wholesale price matters. The Public Power Council's members include public and peoples' utility districts, municipally owned electric systems, and rural electric cooperatives. Twenty-two members have generation facilities which supply a part of their own needs; they purchase the remainder from the Bonneville Power Administration ("BPA"). The other members are entirely dependent on BPA for the power they serve to their consumers.

The common thread binding Public Power Council members together is their status as preference customers of BPA. Congress has declared it a federal policy since 1937 to give these utilities priority access to federal power.¹ The goal of this policy is to spread the benefits of the publicly owned federal dams as directly as possible to the consuming public. This goal is accomplished by serving all the needs of the consumer-owned utilities first. This goal will be lost if BPA is allowed to reverse the priority of access to federal power, as it attempts to do in this case, by selling nonfirm energy to its direct service industrial (DSI) customers ahead of the preference customers.

¹16 U.S.C. § 832c(a)

B. Preference Customer Operations.

Consumer-owned utilities have many uses for nonfirm power which are vital to meeting their power supply needs. For example, due to differences between hydraulic conditions on the federal hydroelectric system and the systems of the generating preference customers, the preference customers often find their reservoirs depleted at a time when BPA has nonfirm energy available. At such times, preference customers purchase nonfirm energy from BPA to restore their reservoirs to proper levels.²

Due to the rising costs of electricity, many farmers in the region can no longer afford to irrigate their lands. BPA recently began making nonfirm energy available to consumer-owned utilities for resale to irrigators, allowing affordable irrigation for what would otherwise be unproductive land.³

Furthermore, industries served by consumer-owned utilities can use nonfirm energy in place of oil or natural gas for their industrial processes. By purchasing nonfirm energy for resale to such industries, the consumer-owned utilities contribute to the economic stimulation of the region and help conserve nonrenewable energy sources as well.⁴

If BPA is allowed to reverse the priority of access to federal nonfirm energy, all these benefits could be threatened or lost. The benefits of public property would go first to the non-preference customer DSIs, contrary to Congressional mandate.

C. The Public Power Council Played a Direct Role in Drafting and Securing Passage of the Regional Act.

Faced with rate disparity among consumers of various private and public utilities, with a potential flood of litigation concerning the allocation of cheap federal power, and with

² See, Respondents' Statement of the Case.

³ See, BPA Notice of Final Action, 48 Fed. Reg. 38533 (1983).

⁴ See, BPA Proposed Policy, 48 Fed. Reg. 33518 (1983).

BPA's inability to continue serving its preference customers' total needs, Congress enacted the Regional Act in order to achieve a regional solution to these power supply and allocation problems. Creating the need for such legislation was the fact that BPA lacked the authority to acquire resources under the Bonneville Project Act.⁵ BPA's inability to acquire sufficient resources to serve its customers' needs became so critical that in 1976 BPA notified its preference customers that it could not assure them enough federal power to meet their load growth needs after 1983. Regional power industry groups, including the Public Power Council, began to draft federal legislation which eventually resulted in the enactment of the Regional Act.

Drafting workable, acceptable legislation proved to be a formidable task. The first attempt at a regional solution was S. 2080, introduced by Senator Henry Jackson in 1977. The bill failed due to opposition from the consumer-owned utilities which arose because of the bill's ambiguous effect on their priority rights.

Accordingly, in 1978, Senator Jackson introduced new legislation, S. 3418. The Public Power Council again pointed out the legislation's failure to address the concerns of BPA's preference customers. In April 1979, Senator Jackson re-introduced the legislation as S. 885.

The Public Power Council did not support the passage of S. 885. Therefore, the Public Power Council and other power industry groups drafted a revised version of S. 885 which firmly protected the priority access to federal power of the consumer-owned utilities. The Public Power Council's amendments were incorporated into the House version of the Bill which was signed into law on December 5, 1980.⁶

⁵ 16 U.S.C. §§ 832-832I

⁶ "The bill incorporates the 'preference clause' protections recommended by the Northwest Public Power Council (sic), solving another delicate problem and heading off potential opposition from the national public power organizations." 125 Cong. Rec. S11592 (daily ed., August 3, 1979), (remarks of Senator Hatfield).

II.

**THE PRIORITY RIGHTS OF THE CONSUMER-OWNED
UTILITIES ARE EXPRESSLY PROTECTED BY THE
LANGUAGE OF THE REGIONAL ACT
AND ITS LEGISLATIVE HISTORY.**

**A. The Consumer-Owned Utilities Had First Right of Access to
BPA's Nonfirm Power Prior to Passage of the Regional Act.**

1. The Statutory Framework.

The Bonneville Project Act of 1937⁷ created the Bonneville Power Administration and established the priorities it was to follow in selling federal electrical power. Section 4(a) of that Act states:

*In order to insure that the facilities for the generation of electric energy at the Bonneville project shall be operated for the benefit of the general public, and particularly of domestic and rural consumers, the administrator shall at all times, in disposing of electric energy generated at said project, give preference and priority to public bodies and cooperatives.*⁸ (emphasis added)

The BPA Administrator also markets power from federal hydroelectric projects under the Flood Control Act of 1944⁹ and the Federal Reclamation Act of 1939.¹⁰ The rationale for these preference clauses is to pass the benefits of these publicly owned resources directly to the consuming public. Establishing a first right of access to federal power for the consumer-owned utilities guarantees that the benefits will pass as Congress intended. The preference clause of the Bonneville Project Act insures that public benefits will pass to the public and not be monopolized by private industries, as had happened earlier with the Niagara Falls project.¹¹

⁷ 16 U.S.C. § 832-832l

⁸ 16 U.S.C. § 832c(a).

⁹ 16 U.S.C. § 825a (1976) ("[p]reference in the sale of such power and energy shall be given to public bodies and cooperatives").

¹⁰ 43 U.S.C. § 485h(c) (1976) (preference shall be given to municipalities).

¹¹ See, Section 2, Respondents' Statement of the Case.

2. Priority Access to Consumer-Owned Utilities Has Historically Applied to Nonfirm Power Sales.

In 1956, the Regional Solicitor for the Department of the Interior reaffirmed that the priority requirements of the Bonneville Project Act and other federal statutes applied to nonfirm energy:

The Bonneville Project Act requires that the Administrator shall at all times, in disposing of electric energy generated at projects subject to the Act, give preference and priority to public bodies and cooperatives. Section 4(a). *This applies to all electric energy generated at the projects, both firm and secondary. Accordingly, the same legal requirements will govern the sale of by-product secondary as now govern sales of firm power.* If public bodies or cooperatives make application to purchase the energy under the new pricing policy inaugurated, their needs will have to be met first. Regional Solicitor's Opinion, March 5, 1956. (emphasis added)

BPA has always followed this directive in its operations. In the Environmental Impact Statement published in December 1980, describing its role in the Pacific Northwest energy supply and its participation in the Hydro-Thermal Power Program ("Role EIS"), BPA states that it allocated nonfirm energy first to public bodies and cooperatives; other non-firm service requests were met, if at all, only after those of consumer-owned utilities.¹² The DSI petitioners and BPA did not dispute below that prior to the Regional Act the DSIs received nonfirm power only *after* the preference customer nonfirm needs were met.¹³

¹² BPA, U.S. Department of Energy, Final Environmental Impact Statement on the Role of the Bonneville Power Administration in the Pacific Northwest Power Supply System ("Role EIS") (DOE/EIS-0066) IV-71 (Dec. 1980).

¹³ *Central Lincoln Peoples' Utility District v. Johnson*, 686 F.2d 708, 712, n.4.

B. The Regional Act Expressly Reaffirms the Priority Rights of Consumer-Owned Utilities.

1. The Statutory Language Preserves Rights of Preference Customers.

Section 5(a) of the Regional Act reaffirms BPA's obligation to observe existing statutory priorities in all its power sales:

*"All power sales under this Act shall be subject at all times to the preference and priority provisions of the Bonneville Project Act of 1937 (16 U.S.C. § 832 and following) and, in particular, sections 4 and 5 thereof. Such sales shall be at rates established pursuant to section 7."*¹⁴ (emphasis added).

In addition to the clear command of Section 5(a), Congress added a blanket savings provision in Section 10(c):

*"Nothing in this Act shall alter, diminish, abridge, or otherwise affect the provisions of other Federal laws by which public bodies and cooperatives are entitled to preference and priority in the sale of federally generated electric power."*¹⁵ (emphasis added).

Congress included Sections 5(a) and 10(c) to preserve the preference and priority rights of consumer-owned utilities as they existed prior to the Act; Congress intended that no provision of the Act interfere with that preference and priority. The Regional Act's preference provisions are not limited to firm power. They are not limited in geographic scope. They are not limited by other provisions of the Regional Act. Sections 5(a) and 10(c) subject "all sales" to the allocation priorities mandated by the preference clauses of other federal statutes.

Finally, Sections 5(a) and 10(c) preclude any other provision of the Regional Act from affecting those allocations in any way. As the Ninth Circuit held, Sections 5(a) and 10(c) direct that the consumer-owned utilities continue to receive priority access to nonfirm power.¹⁶ BPA violated that direction when it reversed the priority of access in the DSI contracts challenged here.

¹⁴ 16 U.S.C. § 839c(a).

¹⁵ 16 U.S.C. § 839g(c).

¹⁶ *Central Lincoln*, at 713.

2. The Legislative History Further Demonstrates Congress' Concern That Preference Be Protected.

Early versions of the regional legislation¹⁷ did not include any preference protections similar to Sections 5(a) and 10(c) of the Regional Act. Representatives of consumer-owned utilities testified that, while Congress might not intend such bills to affect preference rights, the absence of explicit protections would lead to that result.¹⁸

Congress specifically added Sections 5(a) and 10(c) to the Regional Act to make sure that preference would not be subordinated to, nor the priority of allocations reversed by, the rights of DSIs or investor-owned utilities under Sections 5(b), 5(c) or 5(d). During the hearings, Senator Henry Jackson, one of the principal sponsors of the legislation, committed himself to address the concerns of BPA's preference customers:

You have raised a number of points that are of obvious concern to me and the committee, especially and specifically the point on preference and the need to clarify any possible misunderstandings that might occur in connection with our effort to bring about an equitable adjustment in the residential rates.

*And we will certainly have additional language that will make clear the continuity of the preference provision in the law. We will be working with your people on these matters.*¹⁹

Senator Jackson carried out this commitment by asking the Public Power Council to draft amendments that would protect preference. The Public Power Council drafted amendments that ultimately became Sections 5(a) and 10(c) of the Regional Act. In the 96th Congress, Senator Jackson offered the

¹⁷ S. 2080 and H.R. 9020, 95th Cong., 1st Sess. (1977); S. 2080 and S. 3418, 95th Cong., 2d Sess. (1978)

¹⁸ *Pacific Northwest Electric Power Supply and Conservation Act: Hearings on S. 2080 and 3418 Before the Senate Committee on Energy and Natural Resources*, 95th Cong., 2d Sess. 1053; 1058, 1064; 1069; 1079; 1103-04; 1112.

¹⁹ *Id.*, at 1062.

amendments and explained them during the Senate debate on S. 885:

During consideration of S. 2080 and S. 3418 paramount concern was expressed within the region and from other parts of the Nation concerning the impact of the legislation on historic Federal power marketing policies which grant preferential access to federally marketed power to publicly and cooperatively owned utilities. Under S. 3418 all sales of power by the Bonneville Power Administration were subject to the preference clause of the Bonneville Project Act.

However, public agencies expressed the view that language should be added to the bill which would specifically delineate that point. Accordingly, I asked the Public Power Council which represents all publicly and cooperatively owned utilities in the Northwest to draft amendments which would satisfy concerns of preference customers and to formally transmit those amendments to me as chairman of the Senate Energy Committee.

Over a period of several months the Public Power Council worked out a series of amendments to address their concerns. These amendments primarily address the preference clause but they relate to other issues as well. They were formally transmitted to me in February of this year. Because I specifically requested that the Public Power Council prepare these proposals I am introducing the amendments by request of the Public Power Council. I ask that they be printed and referred to the committee for consideration.²⁰

Two committees of the House of Representatives considered the bill that ultimately became the Regional Act. This bill was a House substitute for S. 885 and included both Public Power Council preference amendments as Section 5(a) and 10(c). Both House committees expressed an unmistakable intent that the Regional Act not affect or diminish preference

²⁰ 125 Cong. Rec. S3998 (daily ed. April 5, 1979) (Remarks of Senator Jackson). See also, S. Rep. No. 96-272, 96th Cong., 1st Sess., pages 15, 20, 21, 26 (corrected by 125 Cong. Rec. 11593), 35 (1979).

in any way. The House Committee on Interior and Insular Affairs stated:

It is not, however, a purpose of this legislation to interfere in any way with, or modify the statutory rights of preference customers either within or without the region.²¹

The House Committee on Interstate and Foreign Commerce expressed the same intent:

Concerns have been expressed that S. 885 might be construed to change the meaning or application of preference in the Northwest, and by precedent, nationally. *However, the intention of this Committee is clear. The Committee does not want to undo nearly 80 years of history or establish any precedent. Specific provisions incorporated in the Committee amendment are designed to protect the entitlement of both existing and new preference customers to the full Federal base system. These provisions seek to protect preference as to both supply and price.*²²

Before the Regional Act became law, BPA twice acknowledged that the effect of the Act would be to leave preference intact. In his testimony before the House Committee on Interstate and Foreign Commerce, the BPA Administrator made it clear that public bodies and cooperatives were to retain first call on all power generated by the federal base system resources.²³ Further, the Role EIS, published four days before the Regional Act became law, included an analysis of the legislation as one of the alternative roles under study.²⁴ That analysis concluded that one key element of the pending

²¹ H.R. Rep. No. 96-976, Part II, 96th Cong. 2d Sess. 26 (1980). *See also, Id.* 34, 36, 57.

²² H.R. Rep. No. 96-976, Part I, 96th Cong. 2d Sess. 34 (1980). *See also, Id.* 24, 27, 33-35, 59, 74.

²³ *Pacific Northwest Electric Power Planning; Hearings on H.R. 3508 and 4159 Before the Subcommittee on Energy and Power of the House Committee on Interstate and Foreign Commerce, 96th Cong., 1st Sess. 251 (1979).*

²⁴ Role EIS, I-33 to I-37.

legislation was the preservation of preference unchanged.²⁵ The Role EIS also discusses nonfirm energy sales under the pending regional legislation, but it makes no mention of any change in the priority of those sales.²⁶

The legislative history reflects the clear intention of Congress that Sections 5(a) and 10(c) reaffirm the preference rights of consumer-owned utilities to all sales of federal power. Since the Regional Act expressly preserves existing priorities, including the priority of access to nonfirm energy, BPA violated the Act by contracting with the DSIs to serve them nonfirm energy before the nonfirm was offered to preference customers.

III.

THE HOLDING BELOW IS CONSISTENT WITH CASES INTERPRETING SIMILAR PREFERENCE CLAUSES THAT ARE APPLICABLE TO OTHER POWER MARKETING AGENCIES.

A. Preference is to be Strictly Construed.

Through the preference mechanism, Congress established specific priorities to govern the allocation of federally generated electric power. The court below strictly construed the preference provisions of the Bonneville Project Act and the Regional Power Act in a manner consistent with prior decisions regarding similar clauses.²⁷

The preference clause in the Federal Reclamation Act,²⁸ has been construed as granting consumer-owned utilities priority access to thermal as well as hydroelectric power. *Arizona Power Pooling Association v. Morton*, 527 F.2d 721 (9th Cir. 1975), *cert. denied*, 425 U.S. 911 (1976). The Court in *Arizona* also interpreted the phrase "surplus power", as used in that Act, to include any presently available electricity

²⁵ *Id.*, I-36, III-53; *see also*, IV-334.

²⁶ *Id.*, IV-336.

²⁷ *Central Lincoln*, at 711.

²⁸ 43 U.S.C. § 485h(c)

which must be allocated according to preference. Thus, the court held that since preference applies to the allocation of all power, contracts that allocated surplus thermal power to non-preference customers first, were contrary to the preference clause and therefore invalid.

Significantly, the court also held that the annual appropriation by Congress to the Central Arizona Project did not constitute approval of the Secretary's abrogation of the preference clause.²⁹ Also, the Secretary's discretion to devise the "most feasible plan" did not authorize the Secretary to violate the preference clause.³⁰ Exceptions to preference must be clear and unambiguous.

Arizona is consistent with the present case because in both instances the preference clause was strictly construed to protect the priority access rights to federal power of the consumer-owned utilities. Further, the court in both cases rejected any interpretation of preference which undermined the intent of Congress that the benefits of federally owned property should first go to public entities. As the court in *Central Lincoln* states "[a]ny modification of the preference, in view of its long history and clear reaffirmation in the Act, should be explicit."³¹

In a more recent decision, the Ninth Circuit again reaffirmed the strict application of preference, rejecting an administrative attempt to avoid the statutory allocation of federal power under the Federal Reclamation Act by selling first to a non-preference customer under the guise of "banking" *City of Santa Clara v. Andrus*, 572 F.2d 660 (9th Cir. 1978), cert. denied, 439 U.S. 859 (1978). In *City of Santa Clara*, the City, a preference customer, received electricity from the Central Valley Project on a withdrawable basis. As the demands of other preference customers grew, the City of Santa Clara's service was reduced. However, at the same time

²⁹ *Arizona*, at 726.

³⁰ *Id.*, at 728.

³¹ *Central Lincoln*, at 711.

sales were being made to Pacific Gas & Electric Company (PG&E), a non-preference customer, of substantially greater amounts of power than the City consumed.

The government argued that there was no violation of the preference clause because the power sold to PG&E was "banked" and could be repurchased by the government in the future to maintain a stable power supply for preference customers with non-withdrawable contracts.³²

The court rejected the "banking" terminology as a means of circumventing preference and held that the transaction amounted to a sale of electricity to a non-preference customer in violation of the preference clause:

Congress intended public utilities, wherever possible, to benefit from the sale of low cost federal power. An arrangement which enables a non-preference entity to reap a benefit which Congress sought to bestow upon public entities, even temporarily, flies in the face of that intent.³³

B. The Court Below Correctly Distinguished Authorities Relied On by Petitioners.

1. Cases

The Petitioners rely on several authorities to support the proposition that preference provisions can be modified without Congressional approval. For example, Petitioners rely on *Volunteer Electric Cooperative v. TVA*, 139 F. Supp. 22 (1954), aff'd mem. 231 F.2d 446 (6th Cir. 1956) for the proposition that an agency can limit the scope of preference without express congressional approval.³⁴ In *Volunteer*, the Court upheld a contract whereby the Tennessee Valley Authority (TVA) sold federal power directly to large industries within the service area of Volunteer, a preference customer. Volunteer challenged the direct sale of federal power to a large paper

³² *City of Santa Clara*, at 669.

³³ *Id.*, at 671.

³⁴ Petitioners' Brief, p. 43.

industry that moved into the area as a violation of preference. Volunteer had requested that TVA sell it power for resale to the paper mill. The Court held that no violation of preference arose because the issue was a matter of who would serve a new industrial customer rather than who had a right of prior access to federal power. The Court noted that such direct sales to industrial customers had been expressly ratified by a Congressional committee.³⁵

The instant case, however, involves the issue of whether consumer-owned utilities will retain their priority to access to low cost power for their existing consumers rather than the issue of *who* will serve a new consumer. Further, the legislative history of the Regional Act is devoid of any explicit Congressional approval of BPA's reversal of priorities for the sale of nonfirm energy. As the Court noted in *Central Lincoln*, there was no clear indication in the legislative history of the Regional Act that Congress intended to override the "explicit preference mandate."³⁶

The Petitioners also rely on *City of Anaheim v. Duncan*, 658 F.2d 1326 (9th Cir. 1981), for the proposition that an agency may commit federal power to non-preference customers by contract without regard for statutory allocations.³⁷ In *City of Anaheim*, the City, a preference customer, challenged contracts for the sale of electricity from the Central Arizona Project to private non-preference utilities. The court upheld the contracts for reasons independent of the preference clause. First, the court noted that the primary purpose of the Federal Reclamation Act was to provide reclamation and irrigation, not power, and the challenged contracts were necessary to maintain the efficiency of the irrigation system.³⁸ Second, the contracts were of the relatively short duration of six years.³⁹ Third, the cities did not offer at that

³⁵ *Volunteer Electric Cooperative v. TVA*, 139 F. Supp. 26 (1954).

³⁶ *Central Lincoln*, at 713-714.

³⁷ Petitioners' Brief, p. 22.

³⁸ *City of Anaheim*, at 1330.

³⁹ *Id.*, at 1331.

time to purchase power nor did they indicate that they would need the power in the future.⁴⁰

It was the necessity for the development of an efficient irrigation system and the special factors concerning the contracts that led the court in *Anaheim* to reject challenges to the short term contracts. The court indicated, however, that long term contracts without such unique circumstances would violate preference and therefore be invalid.⁴¹

In contrast, the primary function of the Bonneville Power Administration is to provide low cost electricity to consumers in the region.⁴² Further, the contracts BPA offered to the DSIs would have required BPA to sell nonfirm energy to the DSIs over the twenty year life of the contract, in the face of competing demands from the preference customers, in contrast to the six year contracts in *City of Anaheim*. Finally, the preference customers in the instant case have a need for the nonfirm energy, unlike the preference customers in *City of Anaheim*, which had no need for the power.

2. Statutes.

Petitioners also assert that the language of certain Federal power marketing statutes commit power to non-preference entities without an explicit exception to preference.⁴³ While it may be literally true that these statutes do not say, "preference is limited in the following manner ...", they all do contain clear and unambiguous allocations of specific amounts of power. Not one statute relied on by Petitioners "allocates" power by requiring a load to serve as a reserve, as the DSIs and BPA argue the Regional Act does. The explicitness of the allocations found in these other statutes serves to reinforce the point that Congress limits preference only by such explicit allocations. Merely requiring a load to function

⁴⁰ *Id.*, at 1329.

⁴¹ *Id.*, at 1331.

⁴² 16 U.S.C. § 832c(a).

⁴³ Petitioners' brief, pp. 41-42.

as a reserve does not rise to the level of an irrevocable allocation of power, as the Court below noted.⁴⁴

In other statutes where similar preference provisions have been limited by superseding statutes the language in each case clearly indicates that a fixed amount of power is to be allocated to entities other than those categorized as preference customers. For example, the Niagara Redevelopment Act of 1957⁴⁵ expressly provides that fifty percent of the energy output of the Project must be reserved for preference customers. While the remaining fifty percent may also be marketed to preference customers, the perimeters of the allocation are defined in the statute.

Similarly, the Northwest Power Preference Act⁴⁶ restricts the preference clause of the Bonneville Project Act by stating that those preference customers outside the Northwest region may not receive electricity unless the energy requirements within the region have been fulfilled. Again the language here clearly defines the exception to preference by confining it to certain geographical boundaries.

The other statutes cited by the Petitioners also contain similar language that expressly defines the allocation of power in lieu of preference. The Hungry Horse Dam Act of 1944⁴⁷ establishes a geographical preference, and the Boulder Canyon Project Act⁴⁸ explicitly permits renewal of existing contracts with non preference entities.

The provisions in these Acts achieve a level of clarity sufficient to constitute an unambiguous direction to the agency involved. Such perspicuity is not present in the interpretation of the Regional Act which the Petitioners urge upon the court.

⁴⁴ *Central Lincoln*, at 712-713.

⁴⁵ 16 U.S.C. § 836(b)(1).

⁴⁶ 16 U.S.C. § 837b (1976).

⁴⁷ 43 U.S.C. § 593a.

⁴⁸ 43 U.S.C. § 617b(b).

IV.

OTHER ARGUMENTS ADVANCED BY THE DSIs AND BPA DO NOT JUSTIFY REVERSING THE LONGSTANDING PRIORITIES DIRECTED BY CONGRESS.

A. Section 5(g)(7) of the Regional Act Does Not Authorize the Administrator to Write Contract Terms That Violate Statutory Rights of BPA's Preference Customers.

Section 5(g)(7) of the Regional Act provides, "The Administrator shall be deemed to have sufficient resources for the purpose of entering into the initial contracts specified in paragraph 1(A) through (D)." 16 U.S.C. 839c(g)(7). The DSIs argue that Congress wrote this provision deliberately to prevent any preference challenge to the initial contracts. In support of this proposition, Petitioners cite the Report of the House Committee on Interstate and Foreign Commerce.⁴⁹

The actual language of the Report, however, does not support the DSIs' assertion.⁵⁰ In fact, the language of that Report, when stripped of the additional words supplied by the DSIs in their quotations, shows that Section 5(g)(7) was intended to prevent a legal challenge to the offering of the contracts on the ground that the Administrator did not at that moment have sufficient resources to meet those loads under the contracts. Its purpose was to allow the Administrator time to exercise his new authority to acquire resources. The complete text of the pertinent paragraph of the Report reads:

Section 5(g)(7) is intended to assure that a challenge (on the basis that the Administrator lacks legal authority on account of insufficient power resources) to the initial contracts required to be offered under this Act will not be sustained. In obtaining new resources, however, BPA must do so in accordance with this bill. This provision does not override any other provision of this bill. To the extent that additional power is required to meet these initial contract commitments, BPA can use its existing

⁴⁹ H.R. Rep. No. 96-976, Part I, 96th Cong., 2d Sess. 64 (1980).

⁵⁰ See paragraph F, *infra.*, for a further discussion of incorrect citations in the DSI brief.

short-term authority as well as its authority under this Act.⁵¹

Two points should be noted about this paragraph. First, it says nothing about preference nor makes reference to changing the priorities in the allocations of power for sale. Second, the third sentence specifically states, "This provision does not override any other provision of this bill." Provisions that would be covered by this statement include Sections 5(a) and 10(c), which guarantee that preference and priority in the sale of power will remain unchanged by the Regional Act. Significantly, the DSIs failed to quote this sentence.

Finally, the DSI argument makes an illogical connection between Section 5(g)(7) and the preference issue presented in this case. Section 5(g)(7) protects only the act of offering new long term contracts from a claim that the Administrator was selling something he did not have. The consumer-owned utilities have not claimed that the Administrator cannot sell nonfirm energy to the DSIs, but only that the Administrator cannot reverse the priorities under which that energy is sold. The dispute in this case turns on four specific sections of the new DSI contract wherein the Administrator binds himself to reverse those priorities. Section 5(g)(7) does not protect specific contract terms. If it did, the Administrator could make preference a dead letter in the Northwest simply by contracting with non-preference entities. This is clearly an absurd result. The obvious conclusion is that Section 5(g)(7) was not intended to override the explicit preference mandate of the Bonneville Project Act and the Regional Act.

B. Section 5(f) of the Regional Act Does Not Limit the Application of Preference to Surplus Power.

Section 5(f) of the Regional Act⁵² authorizes the Administrator to dispose of power that is in excess of his contractual commitments, in accordance with existing law. The House Committee on Interior and Insular Affairs states that "Sec-

⁵¹ H.R. Rep. No. 96-976, 96th Cong., Part I, 2d Sess. 64 (1980).

⁵² 16 U.S.C. § 839c(f).

tion 5(f) is a technical provision to insure that BPA has the ability to dispose of any temporary or incidentally surplus power under this Act and other laws applicable to BPA sales."⁵³

The DSIs contend that only the power sold under this section is subject to preference rights of public utilities.⁵⁴ They also argue that this is the only statutory provision under which preference customers purchase nonfirm energy.⁵⁵

These arguments make a mockery of Congress' plain intent, expressed in the language of the Regional Act and other preference statutes. First, preference attaches to all federal power as it is generated; preference does not depend on the status of BPA's load/resource balance.⁵⁶ The DSIs' argument leads to the absurd result that the allocation priorities directed by Congress would only apply if there is so much power available that it does not need to be allocated.

Second, the DSIs' argument ignores the plain meaning of Section 5(a). That section commands, "*All power sales under this Act shall be subject at all times to the preference and priority provisions of the Bonneville Project Act of 1937 (16 U.S.C. § 832 and following) and, in particular, Sections 4 and 5 thereof.*"⁵⁷ All power sales are subject to the priority of access given to consumer-owned utilities, not just sales of excess power. BPA's sales are subject at all times to those priorities, not just when BPA has more power than it needs.

Third, the DSIs' argument ignores the explicit command of Section 10(c) of the Regional Act. That section directs, "*Nothing in this Act shall alter, diminish, abridge, or otherwise affect the provisions of other Federal laws by which*

⁵³ H.R. Rep. No. 96-976, Part II, 96th Cong. 2d Sess. 49.

⁵⁴ Petitioners' Brief, page 27.

⁵⁵ Petitioners' Brief, page 27, fn. 83.

⁵⁶ See, Bonneville Project Act, 16 U.S.C. § 832c(a); Reclamation Project Act of 1939, 43 U.S.C. § 485h(c); Flood Control Act of 1944, 16 U.S.C. § 825s; *Arizona Power Pooling Association v. Morton*, *supra*.

⁵⁷ 16 U.S. § 839c(a) (emphasis added).

public bodies and cooperatives are entitled to preference and priority in the sale of federally generated electric power."⁵⁸ The Federal laws cited direct that public bodies and cooperatives receive priority access to all federally generated power covered by that law, which includes all the power sold by BPA. The DSIs' argument would make Section 10(c) meaningless for Pacific Northwest preference customers.

Finally, Petitioners' interpretation of Section 5(f) confuses "surplus" power with "nonfirm" power. Power can be "nonfirm" if it is produced by streamflows above the levels used in planning system capability, without regard for whether it is "surplus" to BPA's needs. Section 5(f) is a limited provision allowing the Administrator to dispose of whatever power, firm or nonfirm, is in excess of his loads, so as to ease the burden on his ratepayers. It does not in any way change the priorities for the Administrator's sales, because the priorities attach to the power as it is generated. Naturally the power sold under Section 5(f) is subject to preference, but so is all other power sold by BPA. The DSIs' argument ignores this simple fact.

C. DSI Statements Regarding Preference Customer Uses of Nonfirm Energy are Incomplete, Inaccurate and Misleading.

The DSIs state that, if the correct priorities are restored, the consumer-owned utilities will use the nonfirm energy "to increase their sales to other utilities,"⁵⁹ "arbitrage" the power,⁶⁰ and reap "windfall gains" thereby.⁶¹ The DSIs, however, ignore other uses of nonfirm energy being made by consumer-owned utilities and their customers. Under policies announced by BPA and through contracts with the consumer-owned utilities, industrial customers on the preference utility systems are able to take advantage of the lower

⁵⁸ 16 U.S.C. § 839 (g)(c) (emphasis added).

⁵⁹ Petitioners' Brief, p. 47.

⁶⁰ Petitioners' Brief, p. 13.

⁶¹ Petitioners' Brief, p. 49, fn. 122.

cost of nonfirm energy to displace fossil fuels used in their industrial processes. For example, several paper companies are now using nonfirm energy when available, instead of oil or natural gas, to make low pressure steam for use in their mills.⁶²

Under similar policies and contracts, farmers served by preference utilities can take advantage of nonfirm energy to reduce the costs of irrigating their land. As BPA noted, the high cost of energy for irrigation has forced many farmers to withdraw some land from production; these nonfirm sales are meant to address that problem.⁶³

The Pacific Northwest Electric Power and Conservation Planning Council established under Section 4 of the Regional Act⁶⁴ specifically endorsed both types of sales as a way to improve BPA's revenue flow and preserve the benefits of inexpensive nonfirm energy for the Pacific Northwest.⁶⁵

Both these programs depend on the preservation of statutorily mandated priorities to nonfirm energy. If the consumer-owned utilities lose their first right of access to this energy, their industrial and irrigation consumers will be forced to turn to more expensive energy sources whenever an insufficient amount of nonfirm energy is available to serve more than the DSI top quartile. The region would lose the benefits of fossil fuel displacement and increased farm production that these programs were meant to provide.

D. Nonfirm Service to the DSI Top Quartile Provides No Unique Operational or Rate Benefits to the Pacific Northwest.

The DSIs claim that, if the statutory priorities are observed, the region will lose "operating efficiencies and increased revenues" that are claimed to flow from nonfirm

⁶² BPA Proposed Policy, 48 Fed. Reg. 33518. (1983).

⁶³ BPA Notice of Final Action, 48 Fed. Reg. 38533 (1983).

⁶⁴ 16 U.S.C. § 839b.

⁶⁵ 1983 Northwest Conservation and Electric Power Plan, Volume I, pp. 5-12, adopted April 27, 1983. See, Notice of Final Regional Conservation and Electric Power Plan, 48 Fed. Reg. 24493 (1983).

service to the DSI top quartile.⁶⁶ In fact, no such benefits exist, as BPA itself admits.

In their comments on the Draft Role EIS, the DSIs complained that BPA did not adequately describe the same supposed operational and rate benefits.⁶⁷ BPA responded that the high load factor of the DSI plants provided no unique operational benefits to the BPA system that could not be obtained in other ways:

BPA studies indicate that in the unlikely event that the DSI load disappears from the region, steps can be taken through modification of our [extra-regional] power sales contracts (which by their nature of delivering capacity during the daytime and receiving energy back at night force greater fluctuations in our loads) to mitigate the impact of domestic load fluctuations.⁶⁸

BPA also responded to the DSIs' claim that selling nonfirm energy to the DSIs somehow made power cheaper for everyone else:

It is not true that use of secondary energy to meet the top quartile industrial loads has reduced the cost of power to Bonneville's other customers. In the cost-of-service study prepared for the 1979 wholesale rate filing, costs were allocated to the portion of the top quartile DSI load that BPA anticipates it will meet. Therefore, revenues received from sales of power to meet DSI top quartile loads should cover costs incurred in serving the loads.⁶⁹

The DSI argument represents an attempt to frighten the Court into seeing harms associated with the correct priorities of access to nonfirm energy that do not exist. The Court should not be misled.

⁶⁶ Petitioners' Brief, p. 46; *see also*, p. 10

⁶⁷ Role EIS (Attachment A), pp. A-26, A-27.

⁶⁸ Role EIS (Attachment B), p. B-28.

⁶⁹ Role EIS (Attachment B), pp. B-29 - B-30.

E. Priorities of Allocation Do No Depend on BPA's Rights to Restrict DSI Loads.

The DSIs argue that "it was only through the exercise of BPA's restriction rights that preference utilities secured this [nonfirm] power under the 1975 [DSI] contracts."⁷⁰ They claim that because the Ninth Circuit allegedly misunderstood this, the Ninth Circuit did not see that the reduction the DSIs describe in BPA's restriction rights amounted to a guarantee of access to nonfirm energy.

The DSIs confuse restrictions with allocations. Contrary to their assertions, the Ninth Circuit understood the point quite well. The allocation comes first, and that allocation must follow the priority given to consumer-owned utilities. The Regional Act did not change the order in which BPA's customers line up to receive nonfirm energy. As the Ninth Circuit observed, "It is meaningless to speak of interrupting the flow of power that has not yet been allocated. No customer has any expectation of receiving any nonfirm power until BPA allocates it."⁷¹

F. DSI and BPA Arguments Are In Part Based on Incomplete Quotations and Misleading References.

Numerous DSI and BPA arguments contain incomplete quotations, quotations taken out of context, quotations whose meaning has been changed by insertion of additional phrases, and references that do not support the propositions they are cited for. This part of our brief lists the more egregious of such instances, together with the necessary corrections. Others may also exist.

1. a. The DSIs quote the Report of the House Committee on Interior and Insular Affairs as saying:

"The Committee understands and intends that ... [a]pproximately 25 percent of the DSI load [the first quartile] is to be treated as firm for purposes of resource operation and will provide an operating reserve that may

⁷⁰ Petitioners' Brief, at 39.

⁷¹ *Central Lincoln*, at 712.

*be restricted by BPA at any time in order to protect the Administrator's firm loads within the region and for any reason, including low or critical streamflow conditions and unanticipated growth of regional firm loads. An additional 25 percent of the DSI load [the second quartile] will be treated as a firm load for both planning and operating purposes and will provide a planning reserve to protect the Administrator's firm loads against the delayed completion or unexpectedly poor performance of regional generating resources or conservation measures implemented or acquired by BPA.*⁷²

Thus Petitioners argue that this passage directs BPA to adopt a certain theory of top quartile operation in the DSI contract.

b. This is not the way the Committee Report actually reads. The ellipsis in the first sentence hides the omission of an entire paragraph. The House Interior Committee Report actually states:

Sales to existing DSIs are required under this subsection to continue to provide a portion of BPA's power system reserves. The Committee understands and intends that the new DSI contracts under the legislation will provide capacity reserves similar to those provided in the present contracts. Fifty per cent of the then operating DSI load may be restricted for a period of up to two hours to provide a forced outage or peaking power reserve. One hundred [sic] per cent of the DSI load may be restricted by BPA for up to five minutes whenever frequency problems arise on the regional grid.

The DSIs will also provide two types of energy reserves. Approximately 25 percent of the DSI loads is to be treated as a firm load for purposes of resource operation and will provide an operating reserve that may be restricted by BPA at any time in order to protect the Administrator's firm loads within the region and for any reason, including low or critical streamflow conditions and unanticipated growth of regional firm loads. An additional 25 percent of

⁷² Petitioners' Brief, p. 30 (Bracketed language and emphasis in Petitioner's Brief).

the DSI load will be treated as a firm load for both planning and operating purposes and will provide a planning reserve to protect the Administrator's firm loads against the delayed completion or unexpectedly poor performance of regional generating resources or conservation measures implemented or acquired by BPA.⁷³

The Committee thus "understood and intended" that the new DSI contracts would provide *capacity* reserves similar to those provided in the pre-Act contracts. This portion was omitted from the quotation in the DSI briefs. The remainder of the DSI quotation deals with *energy* reserves, an entirely different matter, which the Committee discussed in a separate paragraph.

2. a. The DSIs cite S. Rep. 96-272, 96th Cong. 2d Sess. 59, as supporting a projection of BPA service to between 85 and 96 percent of the total DSI load.⁷⁴ However, Petitioners cite the same passage to support a projection of service to 96% of the total DSI load.⁷⁵

b. The passage referred to in the Senate Report specifies a projected range of service from 85 to 96 percent. Furthermore, the context of the entire section in the Report makes it clear that the projection is based on historical patterns of service, not on any change in the priority of access to nonfirm energy.

3. a. The DSIs purport to set out the operation of preference rules under the Bonneville Project Act.⁷⁶ They cite only Sections 4(b) and 5(a) of that Act,⁷⁷ and state that "preference rules only governed BPA's allocation of power not otherwise lawfully committed by contract."

⁷³ H.R. Rep. No. 96-976, Part II, 96th Cong. 2d Sess. 48.

⁷⁴ Petitioners' Brief, p. 32.

⁷⁵ Petitioners' Brief, p. 9.

⁷⁶ Petitioners' Brief, pp. 13-14.

⁷⁷ 16 U.S.C. §§ 832c(b) and 832d(a).

b. The DSIs failed to cite Section 4(a) of the Bonneville Project Act which states:

In order to insure that the facilities for the generation of electric energy at the Bonneville project shall be operated for the benefit of the general public, and particularly of domestic and rural customers, *the Administrator shall at all times, in disposing of electric energy generated at said project, give preference and priority to public bodies and cooperatives.*⁷⁸

This section is a blanket application of preference to all BPA power sales under the Bonneville Project Act, with no exceptions. It has one effect not noted by the DSIs; BPA may not enter into contracts that violate preference and then claim that the existence of the contract protects the violation.

4. a. The DSIs repeatedly argue that Section 5(g)(7) of the Regional Act protects their contracts from challenge on preference grounds.⁷⁹ They cite the House Committee on Interstate and Foreign Commerce Report, quoting it twice as follows:

Congress's purpose in enacting this legal fiction was made clear: it was "intended to ensure that a challenge [on preference grounds] to the initial contracts required to be offered under this Act *will not be sustained*. House Commerce Report, at 64.⁸⁰

b. First, the DSI quotation omits two lines of text without noting the omission. Second, the substitution of the bracketed phrase "on preference grounds" for the omitted lines completely changes the meaning of the cited paragraph. The paragraph correctly reads:

Section 5(g)(7) is intended to ensure that a challenge (on the basis that the Administrator lacks legal authority on account of insufficient power resources) to the initial

⁷⁸ 16 U.S.C. § 832c(a) (emphasis added)

⁷⁹ Petitioners' Brief, p. 16 and fn. 39; p. 23, fn. 72 and 74; pp. 35-36.

⁸⁰ Petitioners' Brief, pp. 35-36. (Bracketed language and emphasis in Petitioners' Brief.)

contracts required to be offered under this Act will not be sustained. In obtaining new resources, however, BPA must do so in accordance with this bill. This provision does not override any other provision of this bill. To the extent that additional power is required to meet initial contract commitments, BPA can use its existing short-term authority as well as its authority under this Act.⁸¹

As pointed out in paragraph A above, when accurately read, this part of the House Commerce Report clearly explains Section 5(g)(7) as protecting only the act of offering the contracts from claims that the Administrator lacked sufficient resources to sell power. It does not protect specific contract terms that reverse statutory priorities.

5. a. The DSIs argue that Section 10(c) of the Regional Act⁸² was enacted "to reassure preference customers in other regions who feared that the Regional Act — by mandating contracts for and committing power directly to nonpreference customers — would weaken their rights under federal power marketing statutes applicable to them."⁸³ They cite page 34 of the House Commerce Report in support of this claim.

b. Section 10(c) itself contains no such geographical limitation. The other Federal laws referred to in that section include the Bonneville Project Act,⁸⁴ the Flood Control Act,⁸⁵ and the Federal Reclamation Act,⁸⁶ all of which apply to the Pacific Northwest and BPA. Also, the House Commerce Report expresses no geographical limit on Section 10(c); in fact, the complete text of that portion of the Report says that Section 10(c) applies to the Pacific Northwest:

Lastly, section 10(c) of the bill contains a disclaimer which flatly states that the bill does not "alter, diminish,

⁸¹ H.R. Rep. No. 96-976 Part I, 96th Cong. 2d Sess. 64.

⁸² 16 U.S.C. § 839g(c).

⁸³ Petitioners' Brief, p. 26, fn. 81.

⁸⁴ 16 U.S.C. § 832-832l

⁸⁵ 16 U.S.C. § 825a.

⁸⁶ 43 U.S.C. § 485h(c).

abridge, or otherwise affect", either directly or indirectly, the preference provisions of other Federal laws. The Committee clearly intends no such construction of this Act by a court, Federal agency, or others that could affect in any way such provisions of law.

The Committee believes that these and other safeguards adequately protect the preference clause and the long-held rights of preference customers in the Pacific Northwest and elsewhere.⁸⁷

6. a. The DSIs argue that the Regional Act was passed to prevent BPA from allocating power according to preference administratively; they contend that Congress prevented such an allocation by reallocating power by statute.⁸⁸ They cite three passages⁸⁹ from the House Commerce Report in support of this contention.

b. All three passages from the House Commerce Report focus on the fact that the Regional Act grants BPA for the first time the authority to acquire resources to meet the needs of its customers. They make no reference to reversing the preexisting priority for access to any power, including nonfirm energy.

7. a. Both BPA and the DSIs argue that BPA's interpretation of the Regional Act is entitled to extra deference from this Court in part because of the role BPA played in helping Congress draft the statute.⁹⁰ To support this point, they cite pages from the Congressional Record containing the comments of Senator Hatfield and Representative Dingell on BPA's role.⁹¹

b. Both BPA and the DSIs fail to note that Senator Hatfield and Representative Dingell also expressed considerable appreciation for the role that public power played in drafting the Act and securing the consensus needed for its

⁸⁷ H.R. Rep. No. 96-976, Part II, 96th Cong. 2d Sess. 34-35 (1980)

⁸⁸ Petitioners' Brief, p. 34, fn. 101; p. 4-5, fn. 8; p. 35, fn. 103.

⁸⁹ H.R. Rep. No. 96-976, Part I, 96th Cong. 2d Sess. 27-28, 31 and 36-37

⁹⁰ Petitioners' Brief, p. 46 and fn. 115; Federal Brief, p. 21, fn. 17.

⁹¹ 125 Cong. Rec. S11,592 (daily ed. Aug. 3, 1979); 126 Cong. Rec. H9848-49 (daily ed. Sept. 29, 1980).

passage. Both Senator Hatfield and Representative Dingell specifically named the Public Power Council among the entities that lent technical assistance to Congress in the development of the Act's provisions. Accordingly, by the rationale of the DSIs and BPA, the Public Power Council's understanding of the Regional Act should also be entitled to deference.

8. a. BPA maintains that the Regional Act must have altered preference, because no legislation would have been needed had Congress merely wanted to leave preference intact.⁹² In support of this point, BPA relies on the House Commerce Report.⁹³

b. The cited passage from the Committee Report says nothing about changing priorities for nonfirm energy or limiting preference in any way. It discusses the new acquisition authority as the key feature of the Regional Act and describes how that authority will help BPA avoid the problems created by its previously limited power supply. The passage itself states plainly that one necessary feature of any solution to the region's energy problems is the preservation of preference unchanged.

9. a. BPA argues that Congress was fully aware that the Regional Act would change the quality of power whose allocation would be governed by preference rights in the Pacific Northwest.⁹⁴ To support this point, BPA cites the Senate report, S. Rep. No. 96-272, 96th Cong., 1st Sess. 28 (1980).

b. The Senate Report says nothing about preference, priorities of allocation, or nonfirm energy. The only pertinent portion of that page merely discusses how the restriction provisions of DSI service provide reserves for the region.

These nine examples demonstrate the DSIs' and BPA's attempt to rewrite the legislative history. In fact, as pointed

⁹² Federal Brief, pp. 24-25

⁹³ H.R. Rep. No. 96-976, Part I, 96th Cong. 2d Sess. 36 (1980).

⁹⁴ Federal Brief, p. 25.

out above, the legislative history echoes a plain Congressional intent to preserve preference.

CONCLUSION

For the reasons stated above the judgment of the Ninth Circuit Court of Appeals upholding the statutory priorities for the sale of BPA energy should be affirmed.

Dated: October 10, 1983

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1982

STEVAS,
CLERK

ALUMINUM COMPANY OF AMERICA, ET AL.,
PETITIONERS

v.

CENTRAL LINCOLN PEOPLES' UTILITY DISTRICT, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS
IN SUPPORT OF REVERSAL

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QUESTION PRESENTED *

Whether the court of appeals, in determining that the Bonneville Power Administration "unreasonably" interpreted its statutory mandate to supply federal power to nonpreference industrial customers, contravened established principles of judicial review and imposed a judicially created plan of power allocation in place of the carefully crafted statutory plan intended by Congress.

* The federal respondents include: Peter Johnson, Administrator of the Bonneville Power Administration, Donald Paul Hodel, Secretary of the Department of Energy, and the United States of America. Petitioners are: Aluminum Company of America, Georgia-Pacific Corporation, Pennwalt Corporation, Reynolds Metals Company, Intalco Aluminum Corporation, Crown Zellerbach Corporation, Hanna Nickel Smelting Company, Alumax Pacific Corporation, Kennecott Corporation, ARCO Metals Company, Kaiser Aluminum & Chemical Corporation, Pacific Carbide & Alloys Company, Oregon Metallurgical Corporation, and Martin-Marietta Aluminum Company. The other respondents are: Public Utility District No. 1 of Chelan County, Public Utility District No. 1 of Cowlitz County, Public Utility District No. 1 of Douglas County, Public Utility District No. 1 of Snohomish County, Public Utility District No. 2 of Grant County, City of Seattle, City Light Department, City of Tacoma, Department of Public Utilities, Central Lincoln Peoples' Utility District, Clatskanie Peoples' Utility District, Northern Wasco County Peoples' Utility District, Tillamook Peoples' Utility District, Eugene Water & Electric Board, Public Power Council, Portland General Electric Company, CP National Corporation, Pacific Power & Light Company, Puget Sound Power and Light Company, Montana Power Company and Idaho Power Company.

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In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-1071

ALUMINUM COMPANY OF AMERICA, ET AL.,
PETITIONERS

v.

CENTRAL LINCOLN PEOPLES' UTILITY DISTRICT, ET AL.

*ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT*

**BRIEF FOR THE FEDERAL RESPONDENTS
IN SUPPORT OF REVERSAL**

OPINIONS BELOW

The decision of the court of appeals (Pet. App. A-1 to A-14) is reported at 686 F.2d 708. The decision of the Administrator of the Bonneville Power Administration is reported at 46 Fed. Reg. 44340.

JURISDICTION

The judgment of the court of appeals was entered on April 6, 1982. The court of appeals' opinion was amended on September 7, 1982, and a petition for rehearing en banc was denied on September 27, 1982. The petition for a writ of certiorari was filed on December 23, 1982, and was granted on March 28, 1983. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

The pertinent provisions of the Pacific Northwest Electric Power Planning and Conservation Act of 1980, 16 U.S.C. (Supp. V) 839 *et seq.*, are set out at Pet. App. B-1 to B-75.

STATEMENT

1. Since the enactment of the Bonneville Project Act of 1937, 16 U.S.C. 832 *et seq.*, the federal government has provided low-cost hydroelectric power to public utilities, federal agencies, investor owned utilities ("IOUs") and direct service industrial customers ("DSIs" or "industrial customers") in the Pacific Northwest.¹ Although the 1937 Act directed the Administrator of the Bonneville Power Administration ("BPA")² to "give preference and priority to public

¹ Federally-generated hydroelectric power is usually much less expensive than thermal electricity, and the cost differences have tended to increase in recent years. Factors contributing to the difference include longer amortization of dam facilities at lower interest rates, the absence of any need to compensate investors for risk, and the sharp escalation in the prices for fossil fuels and nuclear facilities during the last decade.

² Initially, the BPA Administrator was appointed by, and responsible to, the Secretary of the Interior (16 U.S.C. 832a(a)). Today, pursuant to the Department of Energy Organization Act, 42 U.S.C. (Supp. V) 7101, the Secretary of Energy acts "by and through" BPA but BPA is "preserved as [a] separate and distinct" organizational entity within the Department (42 U.S.C. (Supp. V) 7152(a)(2)). There are four other such regional power marketing agencies that operate under the supervision of the Department of Energy. *Ibid.* The others are the Alaska Power Administration, the Western Area Power Administration, the Southeastern Power Administration, and the Southwestern Power Administration. The Tennessee Valley Authority ("TVA") is a corporation with quasi-governmental powers (16 U.S.C. 831,

bodies and cooperatives," 16 U.S.C. 832c(a),³ for many years BPA had sufficient hydroelectric resources to satisfy all preference customers and also to make substantial sales to nonpreference customers. At first, BPA's contracts with nonpreference IOUs and industrial customers⁴ provided for BPA to supply their full contractual power requirements on a "firm," non-interruptible basis.⁵ That situation

831c). Unlike the other power marketing entities, TVA does not operate under direct Executive supervision with respect to sales of power. BPA is distinguished from TVA and the other power marketing agencies in that it shares some but not all of these quasi-governmental powers (16 U.S.C. 838, 838i). BPA is also the largest of the power marketing agencies and sells at wholesale more than 50% of all power sold in the four state area of Washington, Oregon, Idaho, and Montana. All five power marketing agencies and TVA market power pursuant to various statutes that provide for preference to public bodies and cooperatives.

³ The 1937 Act defined "public bodies" as "[s]tates, public power districts, counties, and municipalities, including agencies and subdivisions * * * thereof"; "cooperatives" were defined as "nonprofit-making * * * organizations of citizens supplying * * * members with any kind of goods, commodities, or services as nearly as possible at cost." 16 U.S.C. 832b. These entities are referred to as "preference customers."

⁴ "Direct service industrial" customers are end users that purchase power directly from BPA, rather than through a utility. The DSIs served by BPA produce *inter alia* approximately 30% of the nation's aluminum, and 100% of the domestically mined nickel.

⁵ "Firm" power is energy BPA can reliably expect to produce from predictable streamflow conditions. "Nonfirm" power is energy in excess of amounts that can reliably be expected; it is provided only when such excess exists, is not guaranteed, and is subject to interruption to protect service to firm obligations. See 16 U.S.C. (Supp. V) 839a(17). "Surplus" power is power that BPA is authorized to sell after

changed with respect to the DSIs in 1948, when BPA modified its industrial sales policy to require DSIs, where feasible, to take some nonfirm power together with firm power. G. Norwood, *Columbia River Power for the People, A History of Policies of the Bonneville Power Administration* 161 (1981). This modification recognized the fact that nonfirm service could be of significant operational benefit by enabling BPA to interrupt the nonfirm portion of the DSI load to provide reserves for other customers.

The situation changed even more significantly in the 1970's. By that time there were no remaining environmentally acceptable sites for additional federal hydroelectric projects. Increasing population and per capita consumption created competing demands for BPA service and eventually reached the point where projections showed that preference customers would soon require all of BPA's power, thus threatening to cut off all other customers. See H.R. Rep. No. 96-976 (Pt. I), 96th Cong., 2d Sess. 23-26 (1980); Pet. App. D-61 to D-63. In light of these changed circumstances, BPA announced that all firm power sales to IOUs would cease in 1973 (Pet. App. D-61). In 1975, BPA's contracts with DSIs specified that 25% of the power available to the DSIs (the so-called "top" or "first" quartile) would be nonfirm and subject to interruption "at any time." See Pet. App. N-5. Further, BPA advised the DSIs that, as their contracts expired during the 1981-1991 period, they were not likely to be renewed. BPA also found that it could not meet all of the requests by entities entitled to

having met the contractual entitlements (established in 16 U.S.C. (Supp. V) 839c(b) and (d)) of the IOUs, and the industrial and preference customers. 16 U.S.C. (Supp. V) 839c(f). Surplus power is sold subject to preference. 16 U.S.C. (Supp. V) 839a.

preference. Accordingly, in 1976, the agency issued "Notices of Insufficiency" to its existing preference customers, informing them that BPA could not satisfy preference customer load growth after July 1, 1983. Pet. App. D-62.

An additional problem also emerged. The BPA power that was available was not being distributed in a manner that benefited consumers evenly throughout the Pacific Northwest. While 80% of the consumers in Washington had access to BPA power because they were served by preference customers, only 20% of the consumers in Oregon had access to BPA power. *Pacific Northwest Electric Power Supply and Conservation: Hearings on H.R. 9020, 9664, and 5862 Before the Subcomm. on Water and Power Resources of the House Comm. on Interior and Insular Affairs, 95th Cong., 1st Sess., Pt. III, 9 (1977) (hereinafter "House Hearings on H.R. 9020")* (statement of Gov. Straub); *id.* Pt. IV, at 4 (statement of Rep. Weaver). In 1977, a consumer in Vancouver, Washington, paid \$10 for 1,000 kilowatt hours of BPA electricity; in Portland, Oregon, a homeowner paid \$27 for the same amount of electricity. *House Hearings on H.R. 9020, Pt. III, supra*, at 4 (statement of Gov. Straub). Oregon passed legislation to create a new state agency as a preference entity and the City of Portland commenced litigation in an effort to alter BPA contract sales patterns. *House Hearings on H.R. 9020, Pt. I, supra*, at 133 (statement of Gov. Ray). In the face of this escalating competition for increasingly scarce resources the Northwest was "poised for regional civil war—an interstate battle over the allocation of low-cost Federal power." *Ibid.* (remarks of Gov. Ray).

2. To "avoid endless and unproductive litigation" and "a prolonged period of economic uncertainty

" * * *," citizens in the Pacific Northwest held scores of meetings in 1977. *House Hearings on H.R. 9020*, Pt. I, *supra*, at 145 (remarks of Gordon Culp, Counsel, Pacific Northwest Utilities Conference Committee) and 301-332 (partial list of meetings). These meetings led to a series of bills considered by the 95th and 96th Congresses. In 1980, after extensive deliberation, Congress passed the Pacific Northwest Electric Power Planning and Conservation Act, 16 U.S.C. (Supp. V) 839 *et seq.* (the "Act" or "Regional Act"). The Act provided for future cooperation in the region by joint federal/state comprehensive planning and expanded BPA powers to acquire resources and encourage conservation. 16 U.S.C. (Supp. V) 839b and 839d. The Act also sought to forestall the battle over the allocation of low-cost federal power by expressly providing that various classes of customers are entitled to BPA power.*

a. Under the Regional Act, BPA must sell its power to every preference customer and investor-owned utility "[w]henever requested," but BPA's obligations are limited to the amounts needed in excess of the requestor's own generation capability and its contractually-obtained capability to meet its firm load. 16 U.S.C. (Supp. V) 839c(b)(1). The purchaser must continue using its own resources to serve its load to the extent possible; if these resources are prematurely retired, they must nevertheless be treated by BPA as if they are still being used. Thus, the preference customer's entitlement under 16 U.S.C. (Supp. V) 839c(b) may not be used to allow the

* In addition to the preference customers, DSI's and IOU's, to whom it is required to sell power, BPA is also authorized to sell power to certain federal agency installations. 16 U.S.C. (Supp. V) 839c(b)(3). Federal purchases will not be discussed in this brief.

preference customer to close down its own facilities or terminate its other purchases. Nor does the Act empower a preference customer to diminish the statutory entitlements of other customers. 16 U.S.C. (Supp. V) 839c(b) and (d). The preference customer does, however, have an undisputed first claim to all "surplus" power, that is, power in excess of the statutory entitlements of other customers. 16 U.S.C. (Supp. V) 839c(f).

b. IOUs are entitled to have BPA meet their full net firm requirements and to participate in the federal power program under an "exchange" arrangement (16 U.S.C. (Supp. V) 839c(b)(1) and (c)(1)).⁷ Such utilities may "swap" their own power, at their average system cost, for an equal amount of lower-priced federal power from BPA. Whenever requested to do so, the Administrator must offer an exchange sale of an equivalent amount of BPA power for resale to the utility's residential users. 16 U.S.C. (Supp. V) 839c(c)(1).⁸ The cost benefits to the region's utilities of this residential exchange program are passed on directly to residential consumers. 16 U.S.C. (Supp. V) 839c(c)(3). See H.R. Rep. No. 96-976 (Pt. I), *supra*, at 60; Pet. App. D-120 to D-121. BPA is to recoup its cost of participating in the utility exchange program by charging higher

⁷ The exchange program is not limited to IOUs, but is available to any "Pacific Northwest electric utility," 16 U.S.C. (Supp. V) 839c(c)(1). As a practical matter, however, the exchange program has been utilized almost exclusively by IOUs.

⁸ BPA's obligations in the residential exchange program began at 50% of the residential load. It is being "ramped in" to 100% of the residential load by 1985. 16 U.S.C. (Supp. V) 839c(c)(2).

prices to the DSIs. See 16 U.S.C. (Supp. V) 839e(c) (1).⁹

c. In return for paying higher prices, the DSIs were afforded certain benefits. Congress determined that sales to the DSIs should continue and BPA was required to "offer * * * to each existing direct service industrial customer an initial long term contract that provides such customer an amount of power equivalent to that which such customer is entitled under its contract dated January or April 1975 providing for the sale of 'industrial firm power.'" 16 U.S.C. (Supp. V) 839c(d) (1) (B). Congress required, however, that some part of these sales would be interruptible: "Such sales shall provide a portion of the Administrator's reserves for firm power loads within the region." 16 U.S.C. (Supp. V) 839c(d) (1) (A).¹⁰

⁹ Under the Act, the DSIs must finance the bulk of the residential exchange program. Preference customers and IOUs pay "a rate or rates of general application" designed to recover the costs attributable to their service. 16 U.S.C. (Supp. V) 839e(b). But, the DSIs no longer purchase federal hydroelectric power at cost. Prior to July 1, 1985, they pay a rate that includes the cost of the resources used to serve the DSIs and the net cost of the exchange program to BPA, to the extent such costs are not recovered through rates for other power sales. 16 U.S.C. (Supp. V) 839e(c) (1) (A). Thereafter, the DSIs will pay a rate "which the Administrator determines to be equitable in relation to the retail rates" paid by industrial purchasers of power from preference customers. 16 U.S.C. (Supp. V) 839e(c) (1) (B); see also 16 U.S.C. (Supp. V) 839e(c) (2). It was anticipated that the price paid by the DSIs for BPA power would immediately triple. *House Hearings on H.R. 9020*, Pt. I, *supra*, at 177 (remarks of Edgar Kaiser).

¹⁰ During the legislative process, the Chairman of the House Subcommittee on Water and Power Resources requested an analysis of the DSI rates and revenues projected under the

d. Neither BPA's production nor its customers' demands are amenable to precise prediction. These interrelated power sales operate in a complex grid with federal, state, local and private participation. Among other variables that affect the level of power produced by BPA and the power needed in the region are weather conditions, such as annual changes in rainfall and snowmelt, as well as a host of economic

proposed statute. BPA's Administrator responded by letter on August 19, 1980 (Pet. App. I-1 to I-23) explaining, in an attachment, how BPA would serve the DSI load. Half of the load could be interrupted to serve as reserves (*id.* at I-23):

Approximately twenty-five percent of the DSI load is to be treated as a firm load for purposes of resource operation and will provide an operating reserve that may be restricted by BPA at any time in order to protect the Administrator's firm loads within the region and for any reason, including low or critical streamflow conditions and unanticipated growth of regional firm loads. An additional twenty-five percent of the DSI load will be treated as a firm load for both planning and operating purposes and will provide a planning reserve to protect the Administrator's firm loads against the delayed completion or unexpectedly poor performance of regional generating resources or conservation measures implemented or acquired by BPA.

The House Interior Committee's Report, issued less than one month later, adopted this language verbatim (Pet. App. E-106 to E-107). The House thereafter voted in favor of the bill, as pertinent here, in the form reported; and the Senate voted to adopt the House version of the legislation. During the Senate debate, key leaders (Senators Jackson and McClure, the former and present Chairmen of the Senate Committee on Energy and Natural Resources) adopted the House Interior Committee's Report. 126 Cong. Rec. S14691, S14698 (daily ed. Nov. 19, 1980). Thereafter, Section 7(c) of the new DSI contracts incorporated the House Interior Report language virtually verbatim (Pet. App. H-1).

factors. Recognizing this reality, Congress took several steps to deal with potential shortages.

Initially, Congress "deemed" BPA "to have sufficient resources" to enter into the contracts required by the Act. 16 U.S.C. (Supp. V) 839c(g)(7). And BPA was given new authority to acquire resources to meet increased demand. 16 U.S.C. (Supp. V) 839d. But even so, provision was made for unanticipated shortages. Thus, the Administrator's obligation to offer to sell power to meet the IOUs' net firm requirements (Section 839c(b)(1)) is tempered by Section 839c(b)(2), which authorizes the Administrator to restrict those obligations "in accordance with Section 5(a) of the Bonneville Project Act of 1937," 16 U.S.C. 832d, which provides, in turn, that BPA contracts may be cancelled on five years' notice "if in the judgment of the administrator any part of the electric energy * * * is likely to be needed to satisfy the requirements of the said public bodies and cooperatives." So, also, contract obligations to DSIs were made subject to interruption when firm load requirements of BPA customers were not satisfied. 16 U.S.C. (Supp. V) 839c(d)(1)(B).

At the same time, preference customers were accorded a first claim on any uncommitted surplus power that might be available after the statutory entitlements of other customer classes were satisfied.¹¹ 16 U.S.C. (Supp. V) 839c(f).

¹¹ The "amount of power" BPA sells to DSIs cannot be increased unless additional " * * * reserves are required for the region's *firm* loads * * *" and the Regional Planning Council agrees that the sale of additional power to the DSIs is a cost effective way to obtain such reserves consistent with the Council's plan. 16 U.S.C. (Supp. V) 839c(d)(3) (emphasis added).

3.a. Congress directed the Administrator of BPA to commence and complete negotiations for the initial long-term contracts with preference customers, IOUs, and DSIs, and to issue simultaneous offers within nine months of the effective date of the Regional Act (December 5, 1980). 16 U.S.C. (Supp. V) 839c (g)(1). BPA implemented the Regional Act by conducting contract negotiations in public and permitting public comment on the negotiations. See Notice of Public Participation in Negotiations of Initial Long-Term Power Sales and Certain Other Contracts, 46 Fed. Reg. 18331 (1981).¹² The public comment

¹² BPA recognized that the issues involved in the sale of hydroelectric power are technical and unfamiliar to the average citizen. For that reason, BPA took exceptional steps to inform and encourage public participation. On December 1, 1980, before the Regional Act became effective, BPA mailed to 8,000 persons and organizations a summary of the legislation and announced four technical meetings to be held in December. On December 5, 1980, BPA wrote to customer groups and individuals, including environmental and public interest groups, local governmental bodies and Northwest Indian Tribes, announcing the time and place of these meetings. On January 5, 1981, BPA issued a press release announcing a series of 26 town hall meetings between January 8 and 22.

On January 23, 1981, BPA held an organizational meeting at which it decided to implement the Act by publicly negotiating prototype contracts for "(1) Power Sales Contracts for Nonscheduling Customers and Scheduling Customers (Computed Demand); (2) Residential Load Purchase/Sale Contracts (Exchange Contracts); (3) Direct-Service Industrial Power Sales Contracts; (4) Conservation Contracts; (5) Purchase of Resource Capability and Resource Plus Preconstruction Investigation Contracts; (6) Purchase of Output, Including Short-Term Power Purchase; (7) Service and Exchange; and (8) Resource Option." 46 Fed. Reg. 18332. BPA issued weekly notices of the negotiating sessions, and

and negotiation sessions yielded draft contracts that were summarized in the Federal Register. Draft Prototype Power Sales Contracts Interpreting Policy Provisions of Pacific Northwest Electric Power Planning and Conservation Act: Publication of Summary of BPA's Proposed Contract Provisions and Request for Public Comment, 46 Fed. Reg. 31238 (1981). Additional public comments were sought; public meetings were held in Seattle, Spokane, Portland, Boise, and Missoula. *Ibid.* BPA also prepared a "report on the environmental considerations that are associated with the issues and alternatives that have been identified during the contract negotiations," which was made available for comment (*id.* at 31239).

In the published notice, the agency stated that each DSI was entitled to the "amount of power to which it is presently entitled under the [1975 Industrial Firm] contracts * * *." 46 Fed. Reg. 31245 (1981). With respect to "BPA Restriction Rights" the notice stated (*ibid.*; emphasis added):

The DSI contracts are required to provide reserves to protect BPA's firm obligations. These reserves are provided through contract rights to interrupt or withdraw power otherwise delivered to the DSIs. The restriction rights may not be exercised for any purpose other than the protection of all BPA firm obligations. Except to the extent of such restriction rights, BPA's contractual obligations to the DSIs are generally identical to its obligations to other customers.

made all documentation available. On April 24, 1981, BPA published a list of discussion topics and announced two additional public meetings for May. See, Notice of Public Meetings To Receive Comments on Contract Negotiations Matters; Request for Agenda Items, 46 Fed. Reg. 23287-23289.

In general, the comments received by BPA were consistent with this understanding. For example, the Intercompany Pool, an association representing IOUs, stated, (COR XXVI at 6921-6922):¹³

* * * Congress has given DSI top quartile new status as a non-firm obligation of BPA, at a higher level than either public agency or ICP markets for secondary. And apparently Congress requires BPA to serve DSI top quartile directly as if it were a firm obligation * * *.

b. On August 29, 1981, BPA issued its Final Action Concerning Power Sales and Residential Exchange Contracts (46 Fed. Reg. 44340 (1981)). With respect to the "top quartile", BPA retained its right to interrupt sales to the DSIs at any time and for any reason, but only in order "to protect Bonneville's ability to meet its Firm Obligations * * *." Contract Offer Section 7(c), 46 Fed. Reg. 44381 (1981); Pet. App. H-1. BPA would not, under the contract offer, interrupt deliveries to the DSIs "for the purpose of selling nonfirm energy * * * (46 Fed. Reg. 44382 (1981); Pet. App. H-1), nor would BPA plan for, or acquire, any resources for "top quartile" deliveries. Contract Offer Section 8(a)(1), 46 Fed. Reg. 44385 (1981). In describing these terms of sale, the Administrator noted BPA would provide "a power quantity with firm characteristics, while not installing resources to meet it on an absolutely firm basis." *Id.* at 44348. The Administrator justified these terms of sale on the plain language of the Regional Act, the

¹³ "COR" refers to "Contract Official Records," so designated by BPA to distinguish this administrative record from other proceedings triggered by the Regional Act. The COR was filed by the government in the court of appeals pursuant to Fed. R. App. P. 17.

Act's legislative history, and the Act's operational policies.

i. The Administrator's decision began with reference to Section 5(d)(1)(B) of the Act (16 U.S.C. (Supp. V) 839c(d)(1)(B)), which requires the agency to offer each existing DSI "an amount of power equivalent" to the 1975 contracts. With respect to the terms of sale of that power, including the "top quartile" (which had been freely interruptible in the 1975 contracts), the Administrator noted that Section 5(d)(1)(A) of the Act (16 U.S.C. (Supp. V) 839c(d)(1)(A)) indicates that sales to the DSIs are "[to] provide a portion of the Administrator's reserves for firm power loads * * *." Section 3(17) (16 U.S.C. (Supp. V) 839a(17)) defines "reserves" as "the electric power needed to avert particular planning or operating shortages for the benefit of firm power customers * * *." The Administrator concluded from these passages that "service to the top quartile cannot be restricted to provide service to non-firm loads or to make sales of nonfirm energy." 46 Fed. Reg. 44348 (1981).

ii. To the extent that there remained any ambiguity as to whether Congress intended the reserve to come from the DSIs' "quasi-firm" "top quartile", the Administrator held that such ambiguity should be resolved by examining the legislative history (46 Fed. Reg. 44348 (1981)):

* * * The Senate Energy Committee Report directs BPA to plan and develop " 'firm' resources under critical streamflow conditions to carry 75 percent of the total DSI requirement," with the additional 25 percent, or "top quartile," to "be served with resources which are in excess of critical planning amounts but operated to meet the entire DSI load as if it were firm." S. Rep. No. 272, 96th Cong., 2d Sess. 59 (1979). In

addition, the House Interior Committee Report states that:

Sales to existing DSI's are required to provide a portion of BPA's power system reserves * * *. The DSI's will provide two types of energy reserves. Approximately 25 percent of the DSI load is to be treated as a firm load for purposes of resource operation and will provide an operating reserve which may be restricted by BPA at any time in order to protect the Administrator's firm loads within the region * * *. An additional 25 percent of the DSI load will be treated as firm load for both planning and operating purposes and will provide a planning reserve to protect the Administrator's firm loads

Senators Jackson and McClure, the past and present Chairmen of the Senate Committee on Energy and Natural Resources, have concurred that the House Interior Committee Report reflects the accurate position of the Senate on the "reserves" question. See 126 Cong. Rec. 14691 (daily ed. Nov. 19, 1980) (remarks of Senator Jackson) and *Id.* at 14698 (remarks of Senator McClure).

iii. The Administrator also indicated that the terms offered to the DSIs would enhance BPA's ability to implement policies underlying the Regional Act. Improved "first quartile" revenues (because of the higher rates paid by DSIs) were expected to increase BPA receipts that would be used to finance the residential exchange program. These sales would also serve to "alleviate the need for BPA to acquire additional expensive generating resources for reserves" (46 Fed. Reg. 44348 (1981)). In the con-

cluding paragraphs of his decision, the Administrator explained that the adopted contract provisions would provide the DSIs "with the power quality required by law with minimum costs and minimum adverse impacts on other customer groups" (*ibid.*).

4. Shortly after the Administrator's decision and the execution of new DSI contracts, a group of preference customers petitioned for review in the United States Court of Appeals for the Ninth Circuit.¹⁴ As pertinent here, the preference customers alleged that the contract offers to the DSIs, particularly Sections 7(c), 8(a)(2) and 8(b),¹⁵ violated the priority accorded to public bodies and cooperatives in the Bonneville Project Act as brought forward by Sections 5(a) and 10(c) of the Regional Act (16 U.S.C. (Supp. V) 839c(a) and 839g(c)), and provided the DSIs with a greater "amount of power" than their 1975 contracts, in violation of Section 5(d)(1)(B) of the Regional Act (16 U.S.C. (Supp. V) 839c(d)(1)(B)).

The court of appeals rejected BPA's interpretation of the Act and voided the contract provisions that ensured that the "top quartile" would be available as a reserve to meet BPA's firm power loads. The court concluded that, because the sales of nonfirm power

¹⁴ The BPA contract offers are final agency actions subject to judicial review under the Administrative Procedure Act, 5 U.S.C. 701-706, 16 U.S.C. (Supp. V) 839f(e)(1) and (2). "Suits" brought to challenge either the constitutionality of the Regional Act or the validity of decisions taken pursuant thereto may be filed "in the United States court of appeals for the region" within 90 days, 16 U.S.C. (Supp. V) 839f(e)(5). Review of the agency's final decision is confined to the administrative record, 16 U.S.C. (Supp. V) 839f(e)(2).

¹⁵ See Contract Offer Sections 7 (Restriction of Deliveries) and 8 (Operation), 46 Fed. Reg. 44381-44388 (1981).

under the 1975 contracts were contingent upon availability and upon public utilities' requests for non-firm power, the "top quartile" had not been "allocated" to the DSIs. Hence, the DSIs were not "entitled" to this amount under the 1975 contracts and it could not be offered to them now. Pet. App. A-6 to A-8.

In addition, the court held that, even if BPA correctly discerned Congress' intent to allocate the non-firm power to the DSIs, BPA's interpretation was unreasonable insofar as it protected that allocation against a preference customer's demand for nonfirm power. Pet. App. A-8.

SUMMARY OF ARGUMENT

1. This case presents a classic instance of judicial overreaching into the administrative process. Virtually every factor this Court has articulated as a basis for deferring to agency decisionmaking is present here: The subject is particularly technical and complex; the agency has longstanding expertise in the area; the statute is new and was, immediately following its enactment, interpreted by the agency charged with implementing its provisions. As the court of appeals observed (Pet. App. A-10 & n.7), the agency's position finds "[s]upport" in the legislative history. Indeed, this concession by the court is an understatement. BPA was intimately involved in the legislative process. When asked by the Chairman of the House Subcommittee on Water and Power Resources to explain how the proposed bill would operate, BPA did so. This explanation was repeated virtually verbatim in the House Report. And, finally, following passage BPA proceeded to do precisely what it had informed Congress it would. Such evi-

dence of fidelity to congressional intent is clear and persuasive and, under all recognized principles of judicial deference, requires affirmance of the agency's statutory construction.

2. In addition to Congress' express ratification of BPA's treatment of the DSIs, the contracts at issue here are consistent with the legislative history on a more general basis. When Congress interceded to avert a "regional civil war" over access to low-price federal power it prescribed a plan of allocation designed to assure fair access to all competing groups. The result was a statute that specifies with extraordinary particularity how preference customers and nonpreference customers, including the DSI petitioners, are to be treated. BPA was required to offer new contracts to its existing DSI customers, and those contracts were to provide for the sale of an amount of power equivalent to the amount to which the DSIs were entitled under existing contracts. In the decision at issue here, BPA did precisely that. The court of appeals, however, has confused the *amount of power*, which is in fact identical under the old and new contracts as the statute requires, with the *terms of power sale*, which have been changed, also in accordance with the Regional Act.¹⁶ When the new contracts are properly understood, it is clear that BPA has acted in a manner consistent with congressional intent.

3. The new DSI contracts would also promote the policies underlying the Regional Act. The carefully crafted statutory plan of allocation creates a delicate

¹⁶ "Terms of power sale" refers to BPA's ability to restrict the load; "amount of power" refers to the fact that BPA has a commitment to serve the full load with the "amount of power" specified in the 1975 contracts.

balance. In particular, the residential exchange program, which permits IOUs to obtain low-price power for residential customers, depends upon BPA receiving increased revenues from sales to DSIs. Because IOUs may "swap" their own higher-priced power for BPA power, the program will inevitably result in increased costs for BPA. Indeed, in the first year (fiscal 1982) following passage of the Regional Act, the net cash benefit of this exchange to the IOUs' residential customers was \$216,592,967. This same figure, of course, represents the amount of loss BPA incurred in the exchange. When these costs are projected over the life of the DSIs' 20 year contracts, BPA estimates an aggregate cost of \$10 billion. Under the Act, this shortfall is to be funded principally by sales to DSIs (16 U.S.C. (Supp. V) 839e (c)(1)(A)). And a key incentive for the DSIs to terminate their existing contracts and replace them with the new contracts mandated by the Regional Act was the improved terms of power sale the Act describes. The benefits Congress provided to the DSIs in improving the quality of power purchased (by limiting the circumstances in which the flow of power could be interrupted) has been negated by the decision below.

The adverse consequences of this decision affect the government as well as the DSIs. By disrupting the balance mandated by statute, the court of appeals' decision threatens to deprive BPA both of the revenues designed to underwrite the residential exchange program and the flexibility to use the DSIs "top quartile" as reserves for BPA to serve its customers' firm loads. Without this reserve capacity prescribed in the statute, BPA may be required to acquire additional generation capacity to serve as reserves, a

step that would not only incur costs Congress did not intend, but would also defeat the Regional Act's encouragement of conservation.

ARGUMENT

THE CONTRACT OFFERS FOR DIRECT SERVICE INDUSTRIAL CUSTOMERS REFLECT A REASONABLE INTERPRETATION OF A COMPLEX, TECHNICAL STATUTE THAT IS CONSISTENT WITH PREFERENCE REQUIREMENTS, IS STRONGLY SUPPORTED BY THE LEGISLATIVE HISTORY, AND ADVANCES IMPORTANT POLICY GOALS

A. The Court Of Appeals Failed To Accord Appropriate Deference To BPA's Construction And Implementation Of The Regional Act

This area of federal regulation is obviously quite complex. In enacting the Regional Act Congress specified with unmistakable precision the amounts of power that were to be allocated to each class of customers. Within this required allocation, Congress delegated to BPA responsibility for implementing the Act with broad discretion to determine the particulars of how power will be sold to each class of customer. We submit the court of appeals failed to accord appropriate deference to BPA's expertise. See *Board of Governors v. Investment Company Institute*, 450 U.S. 46, 56 n.21 (1981); *Board of Governors v. Agnew*, 329 U.S. 441 (1947). Although it noted that BPA's position finds "[s]upport" in the legislative history (Pet. App. A-10 & n.7)—a conclusion that should compel affirmance of the agency's decision—the court nevertheless supplanted the agency's interpretation with a judicially created plan of allocation.

The agency decision at issue here was made immediately following the Act's passage "by the men charged with the responsibility of setting its ma-

chinery into motion, of making the parts work efficiently and smoothly while they are yet untried and new," *Andrus v. Shell Oil Co.*, 446 U.S. 657, 667-668 (1980), quoting *Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294, 315 (1933), and is thus entitled to considerable weight. As this Court recently observed, "[w]e have often noted that the interpretation of an agency charged with the administration of a statute is entitled to substantial deference," *Blum v. Bacon*, 457 U.S. 132, 141 (1982). See also, e.g., *E.I. duPont de Nemours & Co. v. Collins*, 432 U.S. 46, 54-55 (1977); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 381 (1969); *Udall v. Tallman*, 380 U.S. 1, 16 (1965); *Investment Company Institute v. Camp*, 401 U.S. 617, 626-627 (1971). Accordingly, "[t]o uphold [the agency's decision], 'we need not find that [BPA's] construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings.' *Unemployment Compensation Comm'n v. Aragon*, 329 U.S. 143, 153 (1946). See *Mourning v. Family Publications Service*, 411 U.S. 356, 371-372 (1973). "We need only conclude that it is a reasonable interpretation of the relevant provisions." *American Paper Institute, Inc. v. American Electric Power Service Corp.*, No. 82-34 (May 16, 1983), slip op. 20.

These principles are particularly compelling where, as here, the agency made major contributions to Congress' consideration of the statute¹⁷ (*Zuber v. Allen*, 396 U.S. 168, 192 (1969)) and the terms of interpretability contained in the contract provision at is-

¹⁷ See note 10, *supra*; Pet. 14; 125 Cong. Rec. 22567 (1979) (remarks of Sen. Hatfield); 126 Cong. Rec. H9848 (daily ed. Sept. 29, 1980) (remarks of Rep. Dingell); COR I at 59, 189; COR II at 326, 497 (transcripts of technical meetings); COR VI at 1466.

sue were brought to Congress' attention and expressly approved. See note 10, *supra*; Pet. 14-15 & n.7; *United States v. Rutherford*, 442 U.S. 544, 554 n.10 (1979); *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 489 (1940); *Board of Governors v. First Lincolnwood Corp.*, 439 U.S. 234, 248, 251 (1978); *EEOC v. Associated Dry Goods Corp.*, 449 U.S. 590, 600 n.17 (1981).

The Ninth Circuit's rejection of BPA's interpretation cannot be reconciled with the review standards established by this Court. Here, the court has intruded upon the very complex area of the terms of hydroelectric power marketing.¹⁸ The opinion below

¹⁸ BPA operates the largest hydroelectric system in the United States. The Federal Columbia River Power System, for which BPA is the marketing agency, consists of 30 hydroelectric projects with a total installed capacity of more than 19 million kilowatts. BPA also markets the output from a 800,000 kilowatt steam plant and 30% of the 1,080,000 kilowatt Trojan nuclear plant. In short, BPA markets more than 50% of the electricity in the Pacific Northwest, a percentage which Congress assumed would increase under the Regional Act. The marketing effort is supported by BPA's ownership of the nation's largest network of long-distance, high-voltage transmission lines. See S. Rep. No. 96-272, 96th Cong., 1st Sess. 17 (1979); Pet. App. F-37 to F-38; H.R. Rep. No. 96-976 (Pt. 1), *supra*, at 26; Pet. App. D-64 to D-65.

In fulfilling its marketing obligations, BPA must act in a manner that is consistent with the multiuse nature of hydroelectric projects, involving such purposes as flood control, irrigation, navigation, and recreation. Additionally, BPA must coordinate its activities with the operations of utilities with hydroelectric and thermal generation.

Given the complex nature of BPA's operation, it is apparent why Congress recognized and relied on BPA's expertise in drafting the bill and included provisions to assure that the agency's contracts would maximize the benefits of the system to the entire Pacific Northwest. S. Rep. No. 96-272, *supra*; Pet. App. F; H.R. Rep. No. 96-976 (Pt. 1), *supra*; Pet. App. D.

fails to recognize that both the 1975 contracts and the new contracts entitle the industrial customers to a stated "amount of power," and confuses that concept with the question of when the load can be interrupted. As such, the opinion—which relies almost exclusively upon incorrect technical characterizations at odds with the interpretation of the expert agency—does not faithfully execute this Court's holdings concerning review of agency statutory construction.

B. The Act And Its Legislative History Show That Congress Intended BPA To Serve The First Quartile Of The Direct Service Industrial Customers With Improved Interruption Provisions, Limited To Providing A Reserve For The Firm Loads Of Other Customers

Although the decision below has broader implications, the immediate controversy centers on the provisions of the new contracts offered to direct industrial customers that afford those customers a somewhat greater degree of protection against the demands of publicly-owned utilities and cooperatives. Specifically at issue is the so-called "top" or "first" quartile of power furnished to DSIs—the portion of their contract entitlement that is largely served by "nonfirm," or not wholly dependable, energy. It is common ground that this "top quartile" is subject to restriction or interruption when the power is needed to satisfy the "firm loads" of BPA's customers. The question here is whether, as the court of appeals held, the DSIs must also be required to give way—to the extent of this fourth of their contract entitlement—because preference customers, having received all the firm supply promised, want additional nonfirm power. In our submission, the Bonneville Power Administration was fully justified in declining to reach that result.

1. The court of appeals placed undue reliance on Section 5(a), 16 U.S.C. (Supp. V) 839c(a), which preserved the preference recited in the 1937 Act. While Congress retained the existing public utility preference, Section 5(a) and other language relating to preference must be understood in the context of the 1980 legislation. That section is not the entirety of the Act's provision of customer entitlements and, if read in isolation, will produce a result quite at odds with the legislative purpose. For, if Congress had intended to perpetuate the preference without modification, no further legislation was necessary; indeed, the entire 1980 statute would be redundant if it was intended to do nothing more than preserve the status quo under the 1937 Act. See H.R. Rep. No. 96-976 (Pt. I), *supra*, at 36-37; Pet. App. D-80 to D-81. To accept the preference customers' view "would be to impute to Congress a purpose to paralyze with one hand what it sought to promote with the other." *Weinberger v. Hynson, Westcott & Dunning*, 412 U.S. 609, 631 (1973), quoting *Clark v. Uebersee Finanz-Korp.*, 332 U.S. 480, 489 (1947); see *Texas & Pac. Ry. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 446 (1907) ("the act cannot be held to destroy itself").

As this Court recently observed in *Bob Jones University v. United States*, No. 81-3 (May 24, 1983) slip op. 10-11 (quoting *Brown v. Duchesne*, 60 U.S. (19 How.) 183, 184 (1857)):

it is well settled that, in interpreting a statute, the court will not look merely to a particular clause in which general words may be used, but will take in connection with the whole statute . . . and the objects and policy of the law

The preference clause must therefore be analyzed and construed within the framework of the Regional

Act and against the background of the congressional purposes. The Regional Act was passed, in large part, to permit continued sales to nonpreference customers that otherwise would have been impossible.

In following the statutory directive to sell power to the DSIs, BPA also recognizes the continued vitality of the preference provision and the agency's interpretation will preserve it just as Congress intended. Under the 1980 Act, BPA is required to offer contracts with specific allocations of power to certain nonpreference customers, including DSIs. Once these commitments have been satisfied, any further energy generated by BPA ("surplus" energy) is available for sale in accordance with the preference. Section 5(f), 16 U.S.C. (Supp. V) 839c(f). Thus, the surplus will be offered first to public utilities in accordance with the preference. But the court of appeals' opinion would strip the nonpreference customers of their statutory entitlement to purchase non-surplus power by elevating the preference clause to a primacy Congress never intended. It was the threat that such an exercise of preference by public utilities would curtail sharply or eliminate BPA sales to other customers that led Congress to act. H.R. Rep. No. 96-976 (Pt. 1), *supra*, at 36.

Congress was fully cognizant that the 1980 Act would modify the quality of power whose allocation would be governed by preference rights in the region served by BPA. See S. Rep. No. 96-272, 96th Cong., 1st Sess. 28 (1980); Pet. App. F-56 to F-57. Indeed, precisely because a change was made and some feared that the 1980 Act might be construed in a manner that would alter preference rights under other federal energy legislation affecting other regions of the country (Pet. App. D-76), the House Report stated

that there was no intention to "alter, diminish, abridge, or otherwise affect, either directly or indirectly, the preference provisions of *other* Federal [Power] laws." Pet. App. D-78, quoting Section 10 (c), 16 U.S.C. (Supp. V) 839g(c) (emphasis added). See also Pet. App. D-143.

2. Contrary to the view taken by the court of appeals, this is in no way inconsistent with the statutory directive that existing DSIs be offered "an amount of power equivalent to that which such customer is entitled under its contract dated * * * 1975." Section 5(d)(1)(B), 16 U.S.C. (Supp. V) 839c(d)(1)(B). The new contracts provide the DSIs with the same amount of power to which they were previously entitled. That the new contracts improve the *quality* of "top quartile" power, by limiting the circumstances of interruption, does not alter the fact that the DSIs were entitled to the same total amount under the 1975 contracts. Nor is the improvement in quality inconsistent with the language of Section 5(b)(1), 16 U.S.C. (Supp. V) 839c(b)(1), or the statutory allocation that Congress created.

Section 5(d)(1)(B) of the Regional Act required the Administrator to offer the DSIs "an amount of power equivalent" to the amount to which they were entitled in their 1975 contracts.¹⁰ The question be-

¹⁰ "Amount of power" as the term is used in the Regional Act and the 1975 contracts is a term of art. Section 4(a) of the 1975 contracts is entitled "Sale of Power and Amount Sold", and describes the maximum load size for each DSI as measured in "kilowatts" of power (capacity). Pet. App. N-2.

The Regional Act directs that the "amount of power" sold to each DSI remain constant. However, recognizing that sales to the DSIs would off-set the cost of the IOU residential exchange, Congress limited the conditions under which this power could be subject to restriction, or interruption. The

fore the Administrator, as he perceived it, was how to construct new contracts that implemented Section 5(d)(1)(A)—which requires that the sales to DSIs “shall provide a portion of the Administrator’s reserves for firm loads within the region”—in a manner consistent with the definition of “reserves” in Section 3(17) as “electric power needed to avert particular planning or operating shortages for the benefit of *firm* power customers” (emphasis added). The Administrator interpreted these provisions to mean that “service to the top quartile cannot be restricted to provide service to nonfirm loads or to make sales of nonfirm energy.” The court of appeals rejected

1975 agreements provided in General Contract Provision 8(b) that the “top quartile”, or 25% of the DSI load, could be interrupted “at any time”. Pet. App. N-5. This permitted interruption to serve requests by BPA’s preference customers for non-firm service.

The Regional Act altered this unlimited right of interruption by providing that sales to the DSIs provide “a portion of the Administrator’s reserves for *firm* loads within the region.” 16 U.S.C. (Supp. V) 839c(d)(1)(A). The fact that such interruptions are only available for the purpose of serving firm loads is also supported by the Act’s definition of “reserves.” “‘Reserves’ means the electric power needed to avert * * * shortages for the benefit of the firm power customers of the Administrator and available to the Administrator * * * from rights to interrupt * * * as provided by specific contract provisions, portions of electric power supplied to customers.” 16 U.S.C. (Supp. V) 839a(17).

The new contracts are faithful to the statutory directives and to legislative intent. The House Commerce Committee Report, recognized by the Senate as authoritative with respect to the “amount of power” question, notes: “The amount of power the DSIs are entitled to receive under these initial contracts is expressed in 5(d)(1) in terms of an entitlement under their present contracts rather than in terms of the amount of power being used at a particular time.” H.R. Rep. No. 96-976 (Pt. 1), *supra*, at 61; Pet. App. D-121 to D-123.

the Administrator's conclusion, holding that the power comprising the "top quartile" was never allocated and therefore may be interrupted both for firm and nonfirm loads. This holding significantly increases the risk that DSIs will be deprived of approximately 25% (the "top quartile") of their statutory power entitlements, since it is interruptible almost at the whim of preference customers.

3. The legislative history is abundantly plain, however, that Congress intended to insure that the DSIs received their full power entitlement, while providing that the "top quartile" of that power would serve as a reserve to avert shortages incurred by BPA in supplying firm power to other customers. As initially considered by the 95th Congress, the bills proposed to allocate a specific number of megawatts to each class of customers. *House Hearings on H.R. 9020*, Pt. I, *supra*, at 17; *Pacific Northwest Electric Power Supply and Conservation Act: Hearings on S. 2080 Before the Senate Comm. on Energy and Natural Resources*, 95th Cong., 2d Sess., Pt. I, 15 (1978). These bills were not reported out of committee. Later in that session, the House held hearings on another bill, H.R. 13931, which contained a section (5(c)) that provided: "The Administrator is authorized to sell to direct-service industrial customers electric power to meet their *load requirements* so long as such sales provide a portion of the planning and operating reserves for the Federal Columbia River power system." *Pacific Northwest Electric Power Issues: Hearings on H.R. 13931 Before the Subcomm. on Energy and Power of the House Comm. on Interstate and Foreign Commerce*, 95th Cong., 2d Sess. 11 (1978) (emphasis added). H.R. 13931 also died in committee, but bills containing this same provision for DSI sales were reintroduced in the 96th Congress.

Pacific Northwest Electric Power Planning: Hearings on H.R. 3508 and 4159 Before the Subcomm. on Energy and Power of the House Comm. on Interstate and Foreign Commerce, 96th Cong., 1st Sess. 10 (1979); Pacific Northwest Electric Power Planning and Conservation Act: Hearings on S. 885 Before the Senate Comm. on Energy and Natural Resources, 96th Cong., 2d Sess. 12 (1980). By expressing the entitlement in terms of each customer's *full load requirements*, these bills would avoid intra-class disputes over power allocations. It is significant that no distinction was made with respect to how the load had been served, whether or not with interruptible power.

When S. 885 was reported by the Senate Committee, the provision for sales to the DSIs was changed to language quite close to the provision that was ultimately enacted. The Administrator was authorized to sell electric power to DSIs (S. Rep. No. 96-272, *supra*, at 5; Pet. App. F-11 to F-12:

which have contracts * * * so long as such sales provide a portion of the reserves for firm power loads within the region. To effectuate the purposes of this subsection the Administrator shall offer * * * such customers an amount of power equivalent to * * * present industrial firm contracts. The offer and execution of these initial new contracts shall be deemed to be supported by a sufficiency of electric power available to the Administrator.

See S. Rep. No. 96-272, *supra*, at 28; Pet. App. F-56 to F-57. The version of S. 885 reported by the Committee was more specific in that "load requirements," which could expand, became an "amount of power" that was required to be offered and was tied to the existing contracts, which recorded each DSI's amount of power. This provision was split into Sections

5(d)(1)(A) and (B) and 5(g)(7) by both House Committees that issued reports. H.R. Rep. No. 96-976 (Pt. I), 96th Cong., 2d Sess. 11-12 (1980) (Commerce); *id.* (Pt. II), at 11-12 (Interior); Pet. App. D-25 to D-30, E-29 to E-32. While the House version was more precise (by more carefully identifying the exact contract documents to which reference was made), it was not regarded as materially different from the Senate bill. After conference, the Senate yielded to the language adopted by the House. 126 Cong. Rec. S14690 (daily ed. Nov. 19, 1980). Thus, a review of the evolution of the DSI sales provisions shows that Congress at all times considered legislation that would permit sales of the DSIs' full load requirements.

4. In addition, numerous statements were made during the congressional hearings demonstrating that, consistent with the language of the various bills, Congress intended to subject the DSIs' sales only to specific, *limited purpose* interruptions that would promote the overall goals of the Act. When Congress was considering a statutory plan for allocating BPA power, the DSIs' contracts were scheduled to expire between 1981 and 1991. The DSIs were willing to "trade-in" their existing contracts for BPA power at lower rates for new long-term contracts and they were willing to pay an immediate increase of 300% to finance the residential exchange program. *House Hearings on H.R. 9020*, Pt. I, *supra*, at 177 (remarks of Edgar Kaiser). The DSIs were also willing to have their power interrupted, but only to serve certain regional purposes, namely, ensuring that "region[al] utilities will continue to enjoy secure sources of firm power for their customers" (*id.* at 225-226 (remarks of John Holtzapple)). These expressions of views on the terms of interruption of power provided

the background for Congress' eventual determination that BPA's ability to interrupt the DSI load would insure the local utilities' *firm power* needs. The clear understanding of the participants was that BPA would provide power to the DSIs *if BPA had the power*. *Id.* at 225. During peak periods of exceptional consumption, *i.e.*, when BPA runs out of power (not simply when another customer, whose contractual entitlement is already being met, demands more), the DSIs would be interrupted, but not otherwise.

Because it would be interrupted only under limited circumstances of resource or planning failure, the part of the DSIs' load that could be interrupted was regarded as having much higher quality than some unallocated surplus energy. The emphasis was clearly on the provision of a reliable long-term supply. For example, an Oregon state legislator gave this testimony on his understanding of the program (*House Hearings on H.R. 9020*, Pt. III, *supra*, at 17):

The direct service industrial customers would give up their present low-cost electricity, but, in turn, would receive assurance of a firm electrical supply with which they could make long-term plans necessary for economic and employment security in my district and our region.

A company cannot, of course, make long-term plans with a power supply that may be interrupted by another customer's unpredictable, economically-motivated request.

Another indication that the DSIs' interruptible portion was not the equivalent of a bloc of unallocated nonfirm energy is provided in a staff memorandum to Chairman Jackson summarizing the effects of the bill. *Pacific Northwest Electric Power Supply and Conservation Act: Hearings on S. 2080 and S. 3418*

Before the Senate Comm. on Energy and Natural Resources, 95th Cong., 2d Sess., Pt. II, 836 (1978). That memorandum stated (id. at 838 (emphasis added)) :

(d) BPA will be authorized to sell power to meet *DSI load requirements* if such sales provide a portion of BPA's planning and operating reserves. * * *

(e) Any *other* power available on BPA's system will be sold within and without the region as is presently provided under law.

5. Moreover, as the Administrator observed in his opinion, the committee reports of both houses provided specific reference to the DSI contracts and the manner in which those sales would provide the reserves. The Senate Report contains an explanation of the section dealing with DSI sales (Pet. App. F-57; emphasis added) :

The power quality provided the direct-service industries is determined by the reserve obligations set forth in their contracts in order to protect the firm loads of the Administrator. It is intended that these contracts at least provide peaking power reserves similar to those provided in the present contracts, and that the energy reserves shall include a reserve approximately equal to 25 percent of the direct service industrial load to protect firm loads for any reason, including low or critical streamflow conditions, and an additional energy reserve of approximately the same amount to protect firm loads against delayed completion or unexpectedly poor performance of regional generating resources or conservation measures, and against unanticipated growth of regional firm loads. * * *

An Appendix to the Report contains this further explanation (Pet. App. F-74):

This rate applies to all "Industrial Firm" sales to BPA's direct-service industries which provide planning and operating reserves. The quantity of power for rate purposes is based on the proportion of the total industrial requirement, on a long-term average (currently estimated to be between 85 percent and 96 percent of the total DSI load), that BPA projects it will be able to serve directly. This projected availability is predicated on the continued planning and development of "firm" resources under critical stream-flow conditions to carry 75 percent of the total DSI requirements. *The balance would be served with resources which are in excess of critical planning amounts but operated to meet the entire DSI load as if it were firm.* The operation of the System to carry out this purpose results from treating as a firm load the maximum amount of the DSI load (not all of which can be covered under critical streamflow planning), to the extent that this maximum load can be met in the initial period of the PNW Coordination Agreement Critical Period while protecting firm loads against the worst historical streamflow and maintaining an ability to restrict an equivalent amount of the DSI loads in the later periods (without provisional or advance energy being made available for this amount of the DSI load). Further, in actual operation DSI power withdrawn or curtailed in excess of interruptions for critical streamflows would be replaced by power purchased by BPA on a short term basis, if available.

Later, the House Interior Committee Report accompanying the version of S. 885 that became law

contained these explanations (Pet. App. E-91, E-106 to E-107):

Section 3(17) defines "reserves," which represent power available to protect firm loads from various shortage or operating situations. BPA obtains a portion of its power system reserves through rights to curtail power deliveries to direct-service industries; the term is also used in section 6(h) with respect to calculation of billing credits for BPA's customers.

* * * * *

The DSIs will also provide two types of energy reserves. Approximately 25 percent of the DSI load is to be treated as a firm load for purposes of resource operation and will provide an operating reserve that may be restricted by BPA at any time in order to protect the Administrator's firm loads within the region and for any reason, including low or critical streamflow conditions and unanticipated growth of regional firm loads. An additional 25 percent of the DSI load will be treated as a firm loan [sic] for both planning purposes and will provide a planning reserve to protect the Administrator's firm loads against the delayed completion or unexpectedly poor performance of regional generating resources or conservation measures implemented or acquired by BPA.

The source of this language in the House Interior Committee report is significant. As S. 885 reached the mark-up stage after hearings, BPA conferred with the Interior Committee's staff (Pet. App. I-1). At the Committee's request, BPA provided its under-

standing of how the DSI rates would operate and the House Report incorporates the agency's explanation (*id.* at I-23) virtually verbatim. See note 10, *supra*.

Because the Senate and House explanations were expressed somewhat differently, an effort was made to avoid any potential dispute. While the Senate was considering adopting the House version of the bill, Senators Jackson (then Chairman of the Committee on Energy and Natural Resources) and McClure (the present Chairman) rose to state that the House Interior Committee Report accurately stated the operation of DSI reserves. 126 Cong. Rec. S14691, S14698 (daily ed. Nov. 19, 1980).

In sum, the DSI sales, as a part of the "Sale of Power" provision of the Act, evolved into highly specific understandings. The unusual particularity with which Congress addressed the allocation of power reflects the primacy of that issue as well as the underlying legislative desire to eliminate allocation disputes. As one Member remarked (126 Cong. Rec. H10678 (daily ed. Nov. 17, 1980) (remarks of Rep. Duncan)):

It is said that this bill will not prevent litigation. That is certainly true. There may be litigation over rates, over new resources, and over the meaning of many provisions that have been added to the bill largely in order to reassure the bill's critics. But the key point is that litigation under this bill will not include litigation to determine the validity of each entity's new power supply contract.

After reviewing this legislative history, BPA incorporated the express terms of the House Report into its contract offers (Contract Offer Section 8(a) (Prin-

ciples), 46 Fed. Reg. 44385 (1981)) and adopted other provisions to implement these principles elsewhere in the contract.

C. BPA's Interpretation Of The Regional Act Is Consistent With Preference Requirements And Advances The Policies Of The Act

1. Federal hydroelectric power is sold by contract; DSIs, which consume large quantities of electricity and must plan for availability, have historically purchased power under long-term contracts. While Section 5 of the 1937 Act, 16 U.S.C. 832c, requires that preference be given to the applications of public bodies and cooperatives, a lawful long-term sales contract with a DSI customer commits the agency until the contract expires. If this were not the case, the request by a preference customer to purchase power sold to a DSI customer would require immediate interruption of up to the full contractual amount.²⁰ Just as continued sales to the DSIs under their old contracts was not a violation of preference policies, extended sales to the DSIs until the expiration of new long-term contracts directed by Congress would not "alter, diminish, abridge, or otherwise affect the provisions of other Federal laws by which

²⁰ If one accepts the public utilities' argument that the preference clause is absolute in all circumstances, then at least three quartiles of power bought by the DSIs would have been sold in violation of the preference requirements. Congress, however, acted on the understanding, articulated by the DSIs and BPA, that the outstanding 1975 contracts would require BPA sales to some DSIs until 1991. Only when these contracts expired could there be competing applications. Thus, even in the circumstances that existed under the 1937 Act when Congress revisited the statutory scheme, sales to DSIs were, in part, firm.

public bodies and cooperatives are entitled to preference * * * (Section 10(c), 16 U.S.C. (Supp. V) 839g(c)). Only the sale of power to nonpreference customers not sanctioned by a lawful contract would violate historic preference entitlements.

2. The decision of the court below does not add to the preference policies brought forward by Congress and will undermine the Administrator's ability to utilize BPA power sales to achieve the optimum benefits intended by Congress under the Regional Act. Congress was willing to continue to sell federal hydroelectric power to the DSIs, beyond BPA's expiring contractual obligations, in return for higher rates that would finance broader access among residential customers to low-cost federal power. The underlying purpose of the federal policy to sell to non-profit preference customers was to spread the benefits of the federal dam facilities to the citizens of the region. To that end, Congress adopted a residential exchange program to spread the financial benefits of BPA power to many more people than sales limited to preference customers could provide. The Administrator observed that improved DSI "first quartile" power quality would further enhance the agency's ability to perform this goal.

Another important reason for continued sales to the DSIs was to take advantage of their ability to provide reserves for the firm loads in the region. DSI power deliveries can be interrupted, and the ability to close down deliveries to the DSIs enables BPA to meet its commitments to other customers with less generating capacity. This serves to lower BPA power costs as well as to further the conservation goals of the Act. Indeed, the court of appeals conceded (Pet. App. A-13) that "BPA's policy may serve the preference clause * * *."

3. The court of appeals' interpretation of the Regional Act will create anomalous results that Congress did not intend. Section 5(b) of the Act, 16 U.S.C. (Supp. V) 839c(b), affords all preference customers in the region, both past and future, BPA power to meet firm loads net of their own (or contractually acquired) generation capacity. There has been no suggestion that BPA has offered the preference customers anything less. The issue here is the ability of the preference customers to require that the loads of other customers be interrupted whenever demanded so that preference customers could obtain more power than they were allocated by Congress. Since they already have power resources to meet their needs, the preference customers will either (1) shut down their own generation resources (or cancel scheduled deliveries) or (2) resell the power to a third party—perhaps to one of the DSIs at a higher rate—even one outside the region that is supposed to benefit from BPA power. If this occurs, it would mean that, contrary to Sections 5(d)(1)(A) and 3(17), sales to the DSIs are interrupted for purposes other than use as a reserve for the firm loads of the region and other than to avert planning or operating shortages. In that event, BPA would have to acquire more generation capacity than otherwise would be needed, in conflict with the conservation policies of the Regional Act (Section 6).²¹

In short, the court of appeals' opinion is at odds with the statutory language that requires BPA to

²¹ We also note that the interpretation of the court below renders the structure of the Act unnecessarily complicated. There would have been no need for Sections 5(d)(1)(A) and 3(17) if the "first quartile" could be interrupted upon demand, for there would be no reason to state that the DSI portion should serve as a reserve for firm loads.

offer DSIs an amount of power equal to the amount to which they were entitled under their 1975 contracts. The decision is also in conflict with the legislative history, which reveals a careful weighing of competing interests that resulted in a delicate balance assuring that all customers who were entitled to purchase from BPA would receive the amount of power Congress allocated. Finally, the action of the court of appeals cannot be reconciled with established principles of judicial review. The court below has substituted its own view for the carefully considered judgment of the expert agency Congress entrusted with the responsibility of implementing the Regional Act's plan of allocation.

CONCLUSION

The decision of the court below should be reversed.

Respectfully submitted.

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1983

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Petitioners,

v.

CENTRAL LINCOLN PEOPLES' UTILITY DISTRICT, et al.,
Respondents,
and

PETER JOHNSON, as Administrator of the BONNEVILLE
POWER ADMINISTRATION, Department of Energy,
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DEPARTMENT OF ENERGY, and the
UNITED STATES OF AMERICA,
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On Writ of Certiorari
to the United States Court of Appeals
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PETITIONERS' REPLY BRIEF

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No. 82-1071

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Petitioners,

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PETER JOHNSON, as Administrator of the BONNEVILLE
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PETITIONERS' REPLY BRIEF

I.

INTRODUCTION AND SUMMARY OF ARGUMENT

Respondents argue that under the Regional Act¹ Congress intended preference to govern BPA's disposition of all power, including power Congress itself committed to nonpreference customers under statutorily mandated contracts. This argument would overturn the meaning consistently accorded preference under the Bonneville Project Act ("Project Act"),² whose preference provisions the Regional Act reaffirmed. Preference has never governed rights to power already committed by contract, but rather the administrative allocation of uncommitted power that is insufficient to meet the "conflicting or competing" applications of preference and nonpreference customers. Moreover, Respondents' view of preference would make nonsense of the structure and purposes of the Regional Act, in which Congress specified power commitments for nonpreference customers precisely to insure a different allocation of power than would have been possible under preference rules alone. Because preference does not govern power already committed by contract, Respondents' preference arguments are irrelevant; the sole issue is whether BPA reasonably interpreted those Regional Act provisions specifying the contents of the DSIs' mandated contracts.

Respondents further argue that Congress did not commit the disputed power to the DSIs; they argue that the Regional Act contemplates simple renewal of the DSIs' pre-Act contracts, under which BPA could interrupt delivery of this power to the DSIs "at any time." Respondents urge that the notion of an equivalent "amount of power" referenced in the Act requires the new DSI con-

¹Pacific Northwest Electric Power Planning and Conservation Act ("Regional Act"), Pub. L. No. 96-501, 94 Stat. 2697, 16 U.S.C. §§ 839-839h (1980).

²Bonneville Project Act of 1937, 16 U.S.C. §§ 832-832l (1976 & Supp. V 1981).

tracts to contain not only the same "amount of power" provisions as the DSIs' pre-Act contracts but the same "interruption rights" provisions as well. This argument is grammatically untenable, cannot be reconciled with the distinction between "amount of power" and "interruption rights" that characterized the DSIs' pre-Act power commitment and was carried forward in the Regional Act, and would defeat Congress's express statutory limitation on BPA's interruption rights under the new DSI contracts.

Congress committed the disputed power to the DSIs in order to effectuate the Regional Act's rate subsidy program for residential consumers, and to achieve other important regional power benefits. Diversion of the disputed power from the DSIs to Respondents would nullify Congress's plan and jeopardize these goals. BPA, the agency charged with implementing this plan, reasonably interpreted its statutory mandate under the governing legal standard.

II.

THE DSIS' RIGHT TO POWER IS GOVERNED BY REGIONAL ACT PROVISIONS SPECIFYING THE CONTENTS OF THEIR MANDATED CONTRACTS AND NOT BY PREFERENCE

1. Preference Has Never Governed Rights to Committed Power and Is Therefore Irrelevant to the DSIs' Statutory Power Commitment

Seeking refuge in the "plain language" of Sections 5(a) and 10(c), Respondents argue that by reaffirming preference Congress intended all power under the Regional Act—including power committed to nonpreference customers under statutorily mandated contracts—to be subject to claim at any time by preference utilities.³ This flies squarely in the face of the Project Act's preference provisions, which through Section 5(a) govern preference under the Regional Act. These Project Act provisions expressly make all BPA contracts—including contracts with non-

³See, e.g., CL Brief at 18-20 and PPC Brief at 7, 19-20.

preference customers—binding for their duration in accordance with their terms, even if power shortages arise.⁴ Preference has never permitted the usurpation of power lawfully committed to nonpreference customers.⁵ Rather, preference governs the administrative allocation of uncommitted power that is insufficient to meet the “conflicting or competing” applications of preference and nonpreference customers.⁶ Thus, historically preference has only limited an agency’s authority to offer contracts to nonpreference customers in the first instance. If there is sufficient power for all customers, there are no “competing applications” and the agency’s contracting authority is not constrained by preference; contracts with nonpreference customers lawfully may be executed and become binding.⁷

⁴16 U.S.C. § 832d(a). Congress applied this provision to all mandated contracts. 16 U.S.C. § 839c(g)(1). See Regional Solicitor’s Opinion, October 31, 1974 (BPA must honor DSI contracts despite later power requests from preference utilities); 16 U.S.C. § 839c(a).

⁵*Id.* The preference inquiry ends if contracts with nonpreference customers were lawful when offered. See *City of Anaheim v. Duncan*, 658 F.2d 1326 (9th Cir. 1981), *City of Anaheim v. Kleppe*, 590 F.2d 285 (9th Cir. 1978); *Volunteer Electric Coop. v. Tennessee Valley Authority*, 139 F. Supp. 22 (E.D. Tenn. 1954), *aff’d mem.*, 231 F.2d 446 (6th Cir. 1956); *Arkansas Power & Light Co. v. Schlesinger*, No. 79-1263 (D.D.C. 1980) (copy of opinion lodged with Court). See DSI Brief at 14 & n.32, and n.7, *infra*.

⁶16 U.S.C. § 832c(b). “[W]hen there is no shortage, the preference clause slumbers on the shelf unused.” BPA, *Final Environmental Impact Statement* (DOE/EIS-0066) (“EIS”) App. C at III-6 (Dec. 1980). See also Western Area Power Administration, 1982 *Annual Report* 22 (power is allocated when applications exceed supplies, but power already committed by contract is not available for allocation); DSI Brief at 13-15, 41-44.

⁷Absent mandated contracts, the lawfulness of nonpreference customer contracts depends on the agency’s determination that it will have sufficient power to meet the foreseeable needs of preference utilities while performing the nonpreference customer contracts. See nn.4 & 5, *supra*. If that determination was reasonable at the time, those contracts become binding even if preference utilities later apply for the same power. *Id.*

In the Regional Act Congress committed power directly to BPA's nonpreference customers under mandated contracts.⁸ Such contracts are performed "lawful," and hence immune from preference challenge.⁹ The issue is not preference, but whether BPA reasonably construed those statutory provisions prescribing the DSI contracts. If BPA's construction was reasonable then the disputed power was statutorily committed to the DSIs and is not governed by preference; if BPA's construction was not reasonable then the disputed power was not committed to the DSIs and is governed by preference. Either way, the point of departure must be the terms of the statutory commitment itself, not preference.¹⁰ Preference continues to govern BPA's

⁸16 U.S.C. §§ 839c(g)(1), 839c(d)(1)(B). Congress consistently described these contracts as "required." See DSI Brief at 16 n.36. That Congress mandated these contracts distinguishes this case from every preference decision relied on by Respondents and the Ninth Circuit. This emphasizes that there is no national preference policy. See DSI Brief at 1, 14-15 & n.33, 41-44.

⁹Congress has plenary authority to dispose of federal power. *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 330-33 (1936). This authority is unfettered by preference, a statutory mechanism that guides agencies in exercising authority delegated by Congress. Because preference does not affect power committed by statute, Congress described the Regional Act as a "legislative allocation of Federal power" even after reaffirming preference. *House Commerce Report*, at 31 [Cert. A., at D-72].

¹⁰The Private Utility Respondents concede that the decision below must be reversed if Congress committed the disputed power to the DSIs, but argue that absent such commitment all nonfirm power in excess of preference utility demands must be divided equally between the nonpreference DSIs and private utilities. Private Utility Brief at 3 & n.7. The division of uncommitted power among nonpreference customers is not before the Court and was not raised below. The Private Utility Respondents never challenged the new DSI contracts and are now barred from doing so. 16 U.S.C. § 839f(e)(5). See also DSI Brief at 18-19 & nn.51-52.

disposition of all power not committed under those contracts.¹¹

That Congress mandated contracts with nonpreference customers is sufficient to preclude any preference challenge to those contracts. To render this result beyond dispute, when Congress added Section 5(a) to the Regional Act reaffirming preference it simultaneously added Section 5(g)(7) "deeming" BPA to have sufficient power for all mandated contracts.¹² By this legal fiction Congress demonstrated Section 5(a)'s irrelevance here: given sufficient power, all mandated contracts are lawful and protected from preference challenge.¹³

¹¹Preference governs the sale of power that is surplus to BPA's Regional Act contract obligations. See p. 6 & n.15, *infra*. In addition, preference will govern BPA's offer of future contracts to nonpreference customers, which may be executed only if BPA has sufficient power for all customers. See DSI Brief at 16 & n.37, 36 n.106.

¹²16 U.S.C. § 839c(g)(7). See DSI Brief at 16 n.39.

¹³See pp. 2-3, *supra*. See *House Commerce Report*, at 64 [Cert. A., at D-126 to D-127]:

"Section 5(g)(7) is intended to ensure that a challenge (on the basis that the Administrator lacks legal authority on account of insufficient power resources) to the initial contracts required to be offered under this Act will not be sustained."

It is disingenuous for Respondent PPC to suggest this means anything other than protecting the initial contracts from preference challenge, PPC Brief at 17, because an "insufficiency of power" is the basis for any preference challenge and was expressly relied on below. *Central Lincoln Peoples' Utility District v. Johnson*, 686 F.2d 708, 712 (9th Cir. 1982).

By conceding that Section 5(g)(7) protects the offer of mandated contracts to nonpreference customers, Respondents concede Section 5(a)'s irrelevance here; once lawfully offered, BPA's contracts are not governed by preference. Both the Ninth Circuit and Respondent Central Lincoln misinterpret Section 5(g)(7) as providing the DSIs only "what they got before" the Regional Act. CL Brief at 31; 686 F.2d at 712 n.4. However, Section 5(g)(7) by its terms only protects the mandated contracts from preference challenge; it does not purport to specify their contents. Mandated contracts may contain whatever provisions Congress prescribes.

This conclusion is unaffected by Section 10(c), which preserves the preference provisions of all "other" federal power marketing laws.¹⁴ Section 5(f) of the Regional Act expressly precludes BPA from marketing power under any other law unless such power is surplus to BPA's Regional Act contract obligations.¹⁵ Section 10(c) does not purport to establish those contract obligations.

Respondents' corollary arguments merely vary their principal argument. Respondents contend that the disputed contract provisions violate preference by "reversing" BPA's long-standing "marketing priorities" for nonfirm power. Respondents further argue that BPA changed positions, stating prior to passage of the Regional Act that preference was to be preserved but then committing nonfirm power to the DSIs after the Act became law.¹⁶

These arguments cannot be sustained. The disputed contract provisions do not "reverse" BPA's priorities for the use of nonfirm power because BPA has always used nonfirm power first to meet its contract obligations, not for sale to preference utilities.¹⁷ Prior to the Regional Act, Respondents received the disputed nonfirm power because

¹⁴16 U.S.C. § 839g(c).

¹⁵16 U.S.C. § 839c(f). Because under the Regional Act's mandated contracts BPA has no obligation to sell nonfirm power to preference utilities, 16 U.S.C. § 839c(b)(1), those utilities buy nonfirm power only when it is surplus to BPA's contract obligations under Section 5(f). See DSI Brief at 27 & n.83. Congress refused to delete Section 5(f) despite objections by *amicus* American Public Power Association that this section would subordinate all BPA power sales to BPA's new Regional Act contract obligations. *Pacific Northwest Power Supply and Conservation Act: Hearings on S. 2080 and S. 3418 Before the Senate Comm. on Energy and Natural Resources*, 95th Cong., 2d Sess. 1069 (1978). The Opinion below does not mention Section 5(f). See DSI Brief at 19-20, 23-24, 26-27, 29 & n.90.

¹⁶CL Brief at 14-15; APPA Brief at 13-18.

¹⁷EIS, *supra* n. 6, at IV-71 [JA 29]. See DSI Brief at 38 n.108.

that power had not been committed to the DSIs under their 1975 contracts and hence was governed by preference. In the Regional Act, Congress committed nonfirm power to the DSIs and thus created a new contract obligation that BPA was required to meet. The disputed contract provisions simply reflect this change in BPA's contract obligations, and occasion neither a change in BPA's priority use of nonfirm power nor a reversal of BPA's pre-Act position regarding preference.¹⁸

Respondents also argue that if Congress had intended an "exception" to preference it would have declared so "unambiguously."¹⁹ Congress did not "unambiguously" declare an "exception" to preference because it created none; Congress committed power to nonpreference customers directly and reaffirmed preference to govern all remaining power. Congress intended that both actions be given effect.²⁰

2. Respondents' View of Preference Cannot Be Reconciled With the Regional Act's Structure and Purposes

Most fundamentally, to argue that preference governs power under statutorily mandated contracts is to deny significance to those contracts and nullify the legislative allocation of power that was the Regional Act's very purpose.

While conceding that the Regional Act "obligates" BPA to offer contracts to nonpreference customers,²¹ Respon-

¹⁸From 1978 onward BPA and Congress consistently agreed that BPA would serve the DSIs exactly as set forth in the disputed contract provisions. See DSI Brief at 28-34. Those provisions are taken from the Regional Act and the Congressional committee reports, not from BPA's post-Act statements. *Id.*

¹⁹686 F.2d at 713; CL Brief at 23-24. Unlike the Ninth Circuit, Respondents at least concede that statutory power commitments to nonpreference customers are valid without an "explicit exception" to preference. PPC Brief at 15. See DSI Brief at 41-44.

²⁰See DSI Brief at 34-35 & n.103 (citing remarks of Senator Jackson and committee reports).

²¹See, e.g., CL Brief at 30.

dents nonetheless advance a concept of preference that would interdict those "obligations" and strip the contracts of meaning. The notion that preference governs power committed by contract violates not only the Project Act's preference provisions²² but also the most fundamental principles of contract, which presuppose binding obligations and enforceable rights. Respondents do not even suggest what possible meaning could have been intended for the mandated contracts if preference governs power committed thereunder. Indeed, although Respondents limit discussion to the DSIs' one quartile of nonfirm power, their concept of preference necessarily would extend to the DSIs' three quartiles of firm power and all power supplied to non-preference private utilities and federal agencies,²³ thereby denying significance to Congress's specification of mandated contracts for these customer classes.

Respondents' view of preference also would render pointless the statutory provisions that protect preference utilities by requiring BPA to retain contract rights to withdraw power or interrupt nonpreference customers. For example, to insure against power deficits that might harm preference utilities, Congress required that contracts with private utilities include a provision allowing BPA to withdraw power on five years' notice.²⁴ Similarly, Congress required that BPA retain contract rights to interrupt DSI power for the protection of BPA's "firm loads."²⁵ These statutory provisions would be without

²²16 U.S.C. § 832d(a). See pp. 2-3 *supra*.

²³See 16 U.S.C. §§ 839c(g)(1), 839c(b)(1)-(3), 839c(c). In addition to changing the DSIs' power commitment, Congress in the Regional Act also changed the power commitments of other non-preference customers. See DSI Brief at 15-18.

²⁴See 16 U.S.C. § 839c(b)(2).

²⁵16 U.S.C. §§ 839c(d)(1)(A), 839a(17).

purpose if preference utilities already enjoyed the unfettered right to invade nonpreference customer contracts at will.²⁶

Nor can Respondents' view of preference be reconciled with the avowed purposes of the Regional Act, in which Congress sought to provide residential consumers with low cost power and BPA with additional revenues.²⁷ The Regional Act addresses these issues by committing power to all BPA customers and requiring the DSIs to subsidize residential consumers. If, as Respondents contend, preference utilities enjoy a superseding right to all power, then Congress's power commitments are rendered meaningless and the Act's regional goals become subordinated to the interests of a single customer class.²⁸

Respondents do not and cannot dispute that while reaffirming preference Congress simultaneously required BPA to offer contracts to nonpreference customers and specified the power committed under these contracts. What permits these statutory provisions to be harmonized in a manner that gives effect to each is the established role of preference: to govern administrative priorities in the allocation of uncommitted power. Because preference does not govern committed power, Respondents' arguments regarding preference are irrelevant in determining whether BPA reasonably interpreted the Regional Act provisions specifying DSIs' power commitments.

²⁶Nor could such preference rights be reconciled with Regional Act limitations on preference utility contracts. 16 U.S.C. §§ 839c(b)(1), 839c(b)(4)-(6).

²⁷Contrary to Respondents' suggestions, the purposes of the Regional Act cannot be reduced to BPA's new power purchase authority, nor does the validity of the mandated contracts depend on BPA's exercise of that authority. See DSI Brief at 15-18, 36; pp. 16-19 *infra*.

²⁸Respondent PPC argues that preference must be "strictly construed" but relies on cases not involving statutory power commitments for nonpreference customers. PPC Brief at 11. Where Congress has committed power to nonpreference customers, those commitments have been honored despite preference. See DSI Brief at 41-44.

III.

CONGRESS DID NOT SIMPLY RENEW THE DSIS' PRE-EXISTING POWER COMMITMENT

1. **The Regional Act Provides the DSIs the Same "Amount of Power" As Under 1975 Contracts But Changes BPA's Rights to Interrupt that Power and Thereby Changes the DSIs' Power Commitment**

Because DSI power is interruptible, it can be used to provide reserves. Thus, the DSIs' power commitment has always been a function of two separate components:

- (1) "power quantity," expressed as an "amount of power" measured in kilowatts; and
- (2) "power quality," expressed in terms of BPA's rights to interrupt portions of that power.

Bifurcation of the DSIs' power commitment into "quantity" and "quality" components was incorporated in the DSIs' 1975 contracts and carried forward in the Regional Act.²⁰

Under the 1975 contracts each DSI's "amount of power" was expressed as a number of kilowatts. BPA's interruption rights were set forth in a separate section labeled "Restriction of Deliveries." BPA was obligated to make "continuously available" to each DSI its specified "amount of power," except when authorized to interrupt portions of that power. The 1975 contracts permitted BPA to interrupt the DSIs' first quartile power for any purpose, but only upon payment of "availability credits" to the DSIs.²¹

²⁰See DSI Brief at 11-12, 23-28 & n.86.

²¹See DSI Brief at 11-12, 24-26. Had the Ninth Circuit addressed the "amount of power" and "availability credit" provisions of the 1975 contracts, it would have realized that prior to the Regional Act Respondents received the disputed power *not* because this power had never been "initially allocated" to the DSIs, but because under the terms of the DSIs' 1975 contracts this power once allocated could be interrupted "at any time." *Id.* at 37-40. Respondents also fail to address these provisions.

Section 5(d)(1)(B) of the Regional Act provides each DSI an "amount of power equivalent to that to which such customer is entitled under its contract dated January or April 1975 providing for the sale of 'industrial firm power'."⁵¹ Accordingly, the "Amount of Power" provisions of the new contracts provide each DSI the same number of kilowatts as under its 1975 contract.⁵² Section 5(d)(1)(A) of the Regional Act requires the DSIs to provide "reserves for firm power loads," and Section 3(17) defines "reserves" as power available to BPA through "specific contract provisions" permitting BPA to "interrupt" DSI power to avert shortages for BPA's "firm power customers."⁵³ Accordingly, the new contracts obligate BPA to make "continuously available" to each DSI its full "amount of power," except when authorized under the "Restriction of Deliveries" provisions to interrupt that power for the protection of BPA's "firm power loads."⁵⁴

Respondents argue that the Regional Act simply renews the DSIs' 1975 power commitment and that the disputed contract provisions—which limit to the protection of "firm power loads" the purposes for which DSI first quartile power may be interrupted—violate this mandate by providing the DSIs a greater "amount of power."⁵⁵ Respon-

⁵¹16 U.S.C. § 839c(d)(1)(B).

⁵²See DSI Brief at 24-26. TVA contracts also measure "amounts" of industrial power in kilowatts. See TVA, 1979 *Annual Report* Vol. II, App. 245-46; see also 16 U.S.C. § 836(b)(3) (committing "445,000 kilowatts" to industries under the Niagara Redevelopment Act).

⁵³16 U.S.C. §§ 839c(d)(1)(A), 839a(17).

⁵⁴See DSI Brief at 24-26, 28-31; § 14(i) of the new DSI contracts, IX COR 3835 [Cert. A., at H-10 to H-11].

⁵⁵Respondents did not challenge below the "amount of power" provisions of the new DSI contracts, but only the interruption provisions. See DSI Brief at 24-26. In order to conform its argument to the Ninth Circuit's Opinion, Respondent Central Lincoln now asserts that these interruption provisions are "irrelevant." CL Brief at 22-23. This assertion is wrong; interruption rights remain the issue. See n.30 *supra*.

dents contend that the notion of an equivalent amount of power referenced in Section 5(d)(1)(B) means that the new DSI contracts must contain not only the same number of kilowatts as the 1975 contracts, but also the same interruption provisions.³⁶

Respondents' argument cannot be reconciled with the language and structure of the statutory provisions establishing the DSIs' power commitment. Section 5(d)(1)(B) provides each DSI an "amount of power." Nothing in Section 5(d)(1)(B) refers to "interruptions" or "reserves," nor suggests that the "amount of power" concept suddenly has been expanded to encompass both number of kilowatts and interruption rights. On the contrary, straightforward construction establishes that "amount of power" continues to mean what it has always meant: a specified number of kilowatts.³⁷ Respondents' contention that Section 5(d)(1)(B) was intended to freeze BPA's pre-Act interruption rights is grammatically preposterous and strips Sections 5(d)(1)(A) and 3(17) of all function. These provisions expressly refer to "reserves" and, by limiting DSI power interruptions to the protection of BPA's "firm power loads," unarguably change BPA's pre-Act right to interrupt the DSI

³⁶Section 5(d)(1)(B)'s reference to "industrial firm power" does not support Respondents' argument. "Industrial firm power" refers to the grade of power supplied the DSIs under the 1975 contracts; the contracts themselves provided separately for the "amount of power" and "interruption rights" components of the DSIs' power commitment. See DSI Brief at 11-12, 23-28 & n.86. Moreover, Section 5(d)(1)(B) simply references the "industrial firm power" contracts in order to identify which of the two contracts held by the DSIs at the time of the Regional Act established the "amount of power" under their new contracts. See EIS, *supra* n.6, at IV-79 to IV-88.

³⁷Kilowatts measure load size. That Congress equated DSI "amounts" of power with DSI load size and not with BPA's interruption rights is made explicit in Section 5(d)(3) of the Regional Act, which authorizes BPA to increase DSI "loads" by selling the DSIs increased "amounts" of power. 16 U.S.C. § 839c(d)(3).

first quartile for any purpose.³⁸ By changing the "power quality" component of the DSIs' power commitment Congress changed that commitment itself.³⁹

2. The Regional Act's Legislative History Supports BPA's Statutory Interpretation

Congress's intent to change DSI service is confirmed by the Regional Act's legislative history.⁴⁰ To support their contrary arguments, Respondents rely primarily on the Congressional testimony of the DSIs' counsel that the Regional Act provides the DSIs with "lower power quality."⁴¹

³⁸16 U.S.C. §§ 839c(d)(1)(A), 839a(17). See DSI Brief at 11-12, 24-26. The Private Utility Respondents assert that BPA's interpretation "would be entitled to more weight" had Congress stated that "reserves" meant "power needed to protect the customers' firm loads" or that the reserves could be used "only for firm loads." Private Utility Brief at 16 & n.37 (emphasis in original). See also CL Brief at 35-36. In fact, in amending the legislation to define the term "reserves" the Senate Energy Committee made these very statements:

"In this section, the term 'firm power customers of the Administrator' is intended to mean the firm power loads of such customers. It is not intended that the Administrator's reserves will be used to protect other than firm loads."

Senate Report, at 23 [Cert. A., at F-47 to F-48]. See DSI Brief at 28-31.

³⁹Had Congress intended simple renewal of the DSIs' pre-existing contracts, it easily could have so declared rather than detailing the terms of those contracts. Compare 43 U.S.C. § 617d(b) (Boulder Canyon Project Act, requiring contract "renewals" without specifying contract provisions) with 16 U.S.C. §§ 839c(d), 839c(g), and 839e(c) (Regional Act, specifying DSI contract terms in detail).

⁴⁰Respondents incorrectly assert that the DSIs' position depends on legislative history; in fact, it rests on the statutory provisions set forth above, see DSI Brief at 23-27, all but one of which Respondents would ignore.

⁴¹Respondents fail to address most of the legislative history, including the Senate committee's explanation of the term "reserves" and BPA's 1978 analysis of the legislation's DSI service provisions. See nn.18, 38, *supra*.

This testimony does not support Respondents' contention; it concerns BPA's new Regional Act right to interrupt the DSIs' *second* quartile,⁴² which reduces the DSIs' pre-Act "power quality" by exposing an additional quartile of power to interruptions.⁴³ These new second quartile interruption rights, though not at issue here, bear upon analysis of the disputed contract provisions for two reasons. First, Congress sought to increase the DSIs' *average availability* of power in order to effectuate the Regional Act's comprehensive rate provisions; by limiting to the protection of "firm power loads" the purposes for which BPA could restrict the DSIs' first quartile, Congress intended to achieve this increase notwithstanding that other portions of DSI power would be exposed periodically to new interruptions.⁴⁴ Second, that the Regional Act mandates new and different interruption provisions for the second quartile demonstrates that Congress did not intend simple renewal of the DSIs' existing contracts.

Mimicking the Ninth Circuit, Respondents further argue that the Senate Report demonstrates that Congress intended to supply the DSIs' first quartile not with nonfirm power but only with firm power "borrowed" from future years ("shifted FELCC"), and to maintain the DSIs' pre-Act power availability.⁴⁵ Both Respondents and the Ninth Circuit ignore one of the Report's key phrases: the first

⁴²See DSI Brief at 10 & n.17, 33-34 & n.99.

⁴³BPA's new second quartile interruption rights protect BPA's firm loads from shortages caused by power plant delays and conservation shortfalls, and are described in the same Congressional committee reports that describe BPA's new first quartile interruption rights. See, e.g., *House Interior Report*, at 48 [Cert. A., at E-106 to E-107]; DSI Brief at 30-31, 33 n.99.

⁴⁴See DSI Brief at 29-34 & n.99, 47 & n.120; see also pp. 16-17, *infra*. Hence, DSI witnesses emphasized the Regional Act's treatment of "all our loads as firm except when interruptions are necessary to protect other firm loads. . . ." [Cert. A., at 0-4].

⁴⁵686 F.2d at 713-14 n.7. See DSI Brief at 40 n.111.

quartile is to be "served with resources which are in excess of critical planning amounts. . . ."⁴⁶ By definition, this means service with nonfirm power.⁴⁷ Moreover, the Report's projection of 96% average power availability for the full DSI load demonstrates Congress's intention to increase the DSIs' pre-Act service⁴⁸ and supply them with nonfirm power: 96% average power availability for the full DSI load is mathematically unattainable using shifted FELCC alone to serve the first quartile.⁴⁹

⁴⁶*Senate Report*, at 59 [Cert. A., at F-74].

⁴⁷See DSI Brief at 7-8, 31-34. Firm power borrowed from future years ("shifted FELCC") is not a resource "in excess of critical planning amounts," but rather is the resource to which "critical planning amounts" refers. *Id.* Moreover, service with shifted FELCC in itself contradicts Respondents' theory that Congress intended simple renewal of the DSIs' pre-Act contracts: BPA did not serve the DSI first quartile with shifted FELCC prior to the Act. XXVI COR 6920, 6921-22.

⁴⁸See DSI Brief at 31-34. Respondent Central Lincoln argues that the Report contemplates "continuation" of historic DSI service levels ranging as low as 85%. CL Brief at 38. This is incorrect. The Report specifically assumes a BPA power shortage through 1985 and therefore projects 85% power availability until 1985, but 96% availability in each year thereafter. *Senate Report*, at 59 [Cert. A., at F-74].

⁴⁹Mathematically, 96% power availability for the full DSI load requires at least 84% availability for the first quartile. At best, shifted FELCC is available to serve the DSI first quartile for a few months each year, not for 84% of the year (10 months). See 1981 Operating Agreement, VIII COR 2266, 2271.

IV.

CONGRESS INTENDED THE DISPUTED CONTRACT PROVISIONS TO ACHIEVE IMPORTANT REGIONAL POWER SUPPLY AND COST BENEFITS

1. Supplying the DSI First Quartile With Nonfirm Power Effectuates the Regional Act's Rate Subsidy Program for Residential Consumers

The Regional Act created a rate subsidy program for residential and farm consumers to end wholesale rate disparities within the Northwest.⁵⁰ This program forces BPA to incur a revenue loss, which under the Act must be offset by other revenue gains in order for the program to continue.⁵¹ To achieve such revenue gains Congress intended that BPA supply the DSI first quartile with nonfirm power, which produces additional revenue for BPA at no added cost.⁵² This revenue is used to insure that the residential rate subsidy program continues.⁵³ BPA cannot obtain this needed revenue by selling nonfirm power to

⁵⁰16 U.S.C. § 839c(c). See DSI Brief at 15-18.

⁵¹Because the Regional Act constrains BPA's ability to recoup its loss by charging higher firm power rates to preference utilities, 16 U.S.C. § 839e(b)(2), BPA must offset this loss with gains from other power sales or impose surcharges that can terminate the residential subsidy program, 16 U.S.C. §§ 839e(b)(3), 839c(c)(4).

⁵²By "squeezing" from its existing hydro system the power used to serve the DSI top quartile, BPA effectively incurs firm power costs for only three quartiles of the DSI load while obtaining four quartiles of power revenues from DSI rate payments. See, e.g., 16 U.S.C. § 839c(c)(1). See also Letter of BPA Administrator to Hon. Abraham B. Kazen, Jr. ("Kazen Letter") (Aug. 19, 1980), VIII COR 2335 [Cert. A., at I-2 to I-3]; DSI Brief at 10 & n.19, 17-18, 47-48 n.120.

⁵³Any increase in nonfirm service to the DSI first quartile increases BPA's revenues without increasing BPA's costs, and thus reduces the risk of surcharges. See *Senate Report*, at 60-62 [Cert. A., at F-76 to F-80] ("lower DSI loads" will tend to produce the surcharges that jeopardize the subsidy program). See also DSI Brief at 46-48.

Respondents because Respondents make no contribution whatsoever to the rate subsidy program from their purchases of nonfirm power.⁵⁴

2. Sale of Nonfirm Power to Preference Utilities Cannot Achieve the Regional Benefits Congress Intended

In disputing the economic and operational benefits of DSI service for all ratepayers, Respondents contradict both their own testimony⁵⁵ and BPA's formal presentations to Congress.⁵⁶ Only the DSIs receive nonfirm power in combination with firm power borrowed from their own future

⁵⁴BPA does not currently collect any of the program's costs from the sale of nonfirm power to utilities. BPA, *Administrator's Record of Decision, 1982 Wholesale Power Rate Decision 110* (Aug. 1982). Moreover, while BPA does collect a portion of those costs from firm power sales to utilities, 16 U.S.C. § 839e(b)(1), Respondent Central Lincoln's claim that preference utilities will contribute \$250 million to the program in the coming year, CL Brief at 10, is blatantly misleading. This figure represents the program's "gross" cost to all utilities, preference and nonpreference alike; the preference utilities' net contribution to the program is only a small fraction of this total. BPA, *1983 Final Rate Proposal, Wholesale Power Rate Design Study* (Sept. 1983). See also 16 U.S.C. § 839e(b)(2)(C) (establishing a rate "ceiling" specifically limiting the program's impact on preference utility rates).

⁵⁵The Manager of Respondent PPC told Congress:

"Under existing statute [sic] it seems clear that the power presently being sold to BPA's direct service industrial customers will be sold to the public agencies when the DSI contracts expire. . . . It is not reasonable or rational or in anyone's best interest to terminate those loads. Legislation is necessary to allow BPA to continue serving those customers and is a necessary condition if the regional system is to continue receiving the benefits brought about by their contracts."

Pacific Northwest Electric Power Issues: Hearing on H.R. 13931 Before the Subcomm. on Energy and Power of the House Comm. on Interstate and Foreign Commerce, 95th Cong., 2d Sess. 544 (1978) (statement of David Piper).

⁵⁶See, e.g., Kazen Letter, VIII COR 2339-2340 [Cert. A., at I-9] quoted in DSI Brief at 10 n.19.

service, which permits reservoir operations that increase BPA's total power production.⁵⁷

Respondents do not deny that preference utilities arbitrage nonfirm power to other utilities at higher prices.⁵⁸ However, Respondents claim that they can develop beneficial uses for this power: to provide "backup" for their own power plants, displace oil and gas in industrial boilers, and increase irrigation pumping loads. The short answer is that the Regional Act neither commits nonfirm power to preference utilities nor countenances the interruption of DSI loads for these uses.⁵⁹

⁵⁷See DSI Brief at 7-10, 31-34, 46-48; remarks of BPA Power Manager, Dec. 11, 1980, I COR 254-62; Redman, *Nonfirm Energy and BPA's Industrial Customers*, 58 WASH. L. REV. 279, 282-85 (1983). Respondents would do well to consider the substance of this article rather than fulminate about its origin.

Moreover, nonfirm power sales to other entities cannot provide the same quality reserves as sales to the DSIs. For example, DSI nonfirm power can be interrupted instantaneously without the one-hour notice normally provided Respondents, *see, e.g.*, BPA's Proposed Policy: Nonfirm Energy Sales for Utilities' Industry Loads (48 Fed. Reg. 33,518, 33,524) (1983), and provides reserves that BPA could otherwise obtain only with standby generators. EIS, *supra* n.6, at IV-87.

⁵⁸Respondents argue that they use BPA nonfirm power for their own loads and not for resale to other utilities, because the direct resale of federal power is prohibited. CL Brief at 9 n.25. Respondents do not deny, however, that they use BPA nonfirm power to displace their own power, which they then resell. This practice squarely fits the dictionary definition of arbitrage: the simultaneous purchase and sale of the same or equivalent goods in order to profit from price discrepancies.

⁵⁹See pp. 10-13 *supra*. Reliance on nonfirm power as "backup" would breach the Northwest utilities' Coordination Agreement and flout the Regional Act's express provisions. See DSI Brief at 47 n.118. Respondents' other uses were first proposed only after passage of the Regional Act. See BPA's Nonfirm Energy Sales Policy, *supra* n.57, and BPA's Final Action on Short-Term Sale of Nonfirm Energy to Utilities for Irrigation Loads (48 Fed. Reg. 38,533) (1983); Int'l Paper Co. Brief at 3-4. See also, Northwest Power Planning Council,

Finally, Respondents' contention that BPA's operation in conformance with the Ninth Circuit's Opinion has occasioned no harm barely merits response; that BPA has had sufficient nonfirm power to serve all customers during this period does not diminish the harm that the DSIs will suffer if their power is interrupted for purposes not authorized by Congress during the life of these twenty year contracts.⁶⁰

Dated: December 16, 1983

Respectfully submitted,

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Northwest Conservation and Electric Power Plan 5-12 (1983) (although promoting new uses for BPA's nonfirm power, Council "does not mean to imply that [DSI nonfirm] service should be subordinated to new interruptible uses").

⁶⁰Respondents' assertion that the DSIs can readily obtain other power whenever interrupted by BPA is without foundation. *Pacific Northwest Electric Power Supply and Conservation: Hearings on H.R. 9020, H.R. 9664 and H.R. 5862 Before the Subcomm. on Water and Power Resources of the House Comm. on Interior and Insular Affairs, 95th Cong., 1st Sess. 127-65 (1977) (BPA statistics).*

No. 82-1071

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In the Supreme Court of the United States

OCTOBER TERM, 1983

ALUMINUM COMPANY OF AMERICA, ET AL., PETITIONERS

v.

CENTRAL LINCOLN PEOPLES' UTILITY DISTRICT, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE FEDERAL RESPONDENTS
IN SUPPORT OF REVERSAL

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| Finklea, <i>Bonneville Power Administration Rate-making: An Analysis of Substantive Standards and Procedural Requirements</i> , 13 Env'tl. L. 929 (1983) | 14 |
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*ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT*

REPLY BRIEF FOR THE FEDERAL RESPONDENTS IN SUPPORT OF REVERSAL

The briefs of the respondents and their supporting amici demonstrate that they seek to wage in the courts the very "regional civil war" over access to federal power resources that Congress sought to prevent. H.R. Rep. 96-976, 96th Cong., 2d Sess., Pt. I, at 26-27 (1980); Pet. App. D-65. They may, of course, pursue their claims in the legislative forum. But, for the time being, the parties and the courts must accept the resolution of the complex economic and social issues that Congress ordained when it exhaustively reviewed the situation in the affected region of the country and passed the Pacific Northwest Electric Power Planning and Conservation Act of 1980 (Regional Act), 16 U.S.C. 839 *et seq.* While broader concerns form the backdrop of this litigation, they should not deflect attention from the straightforward legal issues that are now at center stage.

The only questions properly before the Court relate to the meaning of the Regional Act and the reasonableness of the construction given its relevant provisions by the Bonneville Power Administration (BPA). Because the respondents and amici venture far afield from the core issues, our reply will attempt to return the focus to the only legal questions presented, explaining why the respondents' arguments are largely irrelevant. Finally, we will discuss some of the specific contentions they set forth in order that they may be properly understood.

1.a. Our earlier briefs (Gov't Pet. Br. 2-3; Gov't Br. 2-6)¹ explained the history of federal provision of hydro-electric power in the region and the struggle that had emerged by the mid-1970s among classes of customers seeking to preserve their share of this lower-cost power in the face of predicted shortages. As it stood, no class of customers—including preference customers—could be assured of receiving all the power it needed.² Congress then set about the task of fashioning an allocation plan

¹ "Gov't Pet. Br." refers to the Brief for the Federal Respondents in support of the petition for a writ of certiorari; "Gov't Br." refers to the merits Brief for the Federal Respondents in Support of Reversal. "CL Br." refers to the Brief for Respondents Central Lincoln Peoples' Utility District, et al. "PPC Br." refers to the Brief of Respondent Public Power Council. "IOU Br." refers to the Brief for Respondents Portland General Electric Company, et al. "APPA Am. Br." refers to the Brief Amicus Curiae by the American Public Power Association, et al.

² Under the proposed BPA administrative allocation plan that preceded the Regional Act, even preference customers would not have received their full firm power requirements. H.R. Rep. 96-976, 96th Cong., 2d Sess., Pt. II, at 30-31 (1980); Pet. App. E75-E76. Accordingly, the public utility respondents' suggestion that the Act somehow deprives them of something they would have had is demonstrably untrue. Without the Act, BPA's preference customers would have been "limited to a pro rata share of BPA power after 1991. Unfortunately, these shares will fall far short of meeting their requirements * * *." *Ibid.*

that accommodated a myriad of conflicting interests. In this compromise, no class of customers got all it wanted; concessions were required of each in order to create a satisfactory plan of allocation for all.

With specific reference to the direct service industrial customers (DSIs), the Regional Act effectively compelled the abandonment of contracts entered into in 1975. In addition, the DSIs were subject to paying substantially higher rates, in part to offset the costs BPA would incur under the residential exchange program that provided lower-cost federal power to customers of investor-owned utilities (IOUs). See Gov't Pet. Br. 3-4; Gov't Br. 7-8; H.R. Rep. 96-976, *supra*, Pt. I, at 29; Pet. App. D69; 126 Cong. Rec. 30184 (1980) (remarks of Sen. Hatfield) ("This bill will mean, in effect, a saving of \$1 billion in the next 10 years for the ratepayers of Oregon, with the revenue slack being made up by the direct-service industrial customers who will get renewed long-term contracts in return for the higher rates that they will pay."). On the other side of the ledger, these concessions by the DSIs were counterbalanced by certain benefits. First, the Regional Act required BPA to offer its existing DSI customers long-term contracts for the sale of an amount of power equivalent to their entitlements under the 1975 contracts. Moreover, the Regional Act reduced the circumstances under which a portion of the DSIs' purchases—the top quartile—could be interrupted for use by preference customers.³ The effect of this change was to assure the DSIs of a more reliable source of power for a longer period of time than they enjoyed under the 1975 contracts.

A similar process of give-and-take affected all classes of customers. We focus here on the DSIs, because it is the new DSI contracts that gave rise to this litigation.

³ Under the 1975 contracts, the top quartile, or 25% of the DSI load, was "nonfirm" and subject to interruption at any time and for any reason. The Regional Act altered the terms of restriction for the top quartile; it was sold "as if it were firm" and could be interrupted only to satisfy BPA's firm load needs.

In so doing, however, we do not lose sight of the fact that the statutorily mandated DSI contracts are but one thread of the intricate tapestry of the Regional Act;⁴ if, as the court of appeals held, that thread is to be removed the whole fabric of the Act would unravel.

b. Our argument in support of the Administrator's decision to offer the new DSI contracts is rooted in the statutory language. Section 5(d)(1)(B) requires that "the Administrator shall offer * * * to each existing direct service industrial customer an initial long term contract." 16 U.S.C. 839c(d)(1)(B). See also Section 5(g)(1) (16 U.S.C. 839c(g)(1)). On this point there is no dispute.

The parties go separate ways over the interpretation of other language in Section 5(d)(1)(B), the portion requiring that the new DSI contracts offer an "amount of power equivalent to that to which such customer is entitled under its [1975] contract." The basis for the disagreement is quite narrow. Thus, the briefs in this Court do not dispute that the old and new contracts both sold the same number of kilowatts.⁵ The BPA Administrator concluded that the sale of the same number of kilowatts satisfied the statutory directive to sell an equivalent amount of power. 46 Fed. Reg. 44348 (1981). This would appear to be unexceptionable. Yet respondents object (CL Br. 31-34; PPC Br. 11; IOU Br. 13-16; APPA Am. Br. 23). They claim that since the top quartile of DSI power cannot be interrupted to make nonfirm sales to respondents, as the 1975 contracts permitted, that the

⁴ In addition to requiring BPA to sell power to DSI's the Regional Act also required for the first time that BPA make sales to privately-owned utilities. While BPA had made such sales in the past, when surplus power was available, it was under no statutory directive to do so.

⁵ See BPA's Memorandum in Opposition to Motion for Temporary Injunction or Stay Pending Review (at 19-21), a brief filed in the court of appeals which compares the number of kilowatts sold in the old and new contracts and explains why certain de minimis differentials exist. See J.A. 20.

amount of power sold is not equivalent because there will be more hours in which DSIs receive power for the top quartile. This misses the point. Despite respondents' highly technical argument, the fact remains that the 1975 contracts and the new contracts provide for the sale of the same amount of power virtually down to the last kilowatt—there is not the slightest difference in *amount* and that is just what the statute requires.

The different terms of interruptibility not only do not alter the total contractual amount, but also are required by the Regional Act. Whereas in the past the top quartile of power sold to DSIs could be interrupted for any reason, Section 5(d)(1)(A) of the Regional Act, 16 U.S.C. 839c(d)(1)(A), specifies that sales to DSIs "shall provide a portion of the Administrator's reserves for firm power loads." Under Section 3(17) (16 U.S.C. 839a(17)), "reserves" means "the electric power needed to avert * * * shortages for the benefit of firm power customers * * * available to the Administrator * * * from rights to interrupt, curtail, or otherwise withdraw, as provided by specific contract provisions, portions of the electric power supplied to customers."⁶ When these provisions are read together, two important points become clear. First, interruption is permitted only to satisfy firm power needs (see note 6, *supra*)—this is precisely the change implemented in the new DSI contracts. Second, the DSIs' top quartile is intended to serve as a reserve for such firm power needs when and if they arise. Reserves provide additional energy, available when needed, to satisfy firm load requirements without acquiring additional generation facilities that would stand idle

⁶ The report of the Senate Committee on Energy and Natural Resources clearly explains: "the term 'firm power customers of the Administrator' is intended to mean the firm power loads of such customers. It is not intended that the Administrator's reserves will be used to protect other than firm loads." S. Rep. 96-272, 96th Cong., 1st Sess. 23 (1979); Pet. App. F47-F48. This congressional comment fully answers respondents' argument (IOU Br. 16) that the reserves could be used for other than firm loads.

until such need arises. The preservation of this additional capacity is much less expensive, and less wasteful, than the alternatives of maintaining idle facilities or of purchasing power elsewhere at higher rates. Without this reserve, BPA obviously could not comply with the statutory directive that reserves be maintained or BPA would be relegated to the more expensive alternatives for satisfying customers' firm needs.⁷

It is therefore irrelevant to suggest, as respondents do (CL Br. 36), that these reserves could be satisfied by the sale of nonfirm power to others. The Regional Act clearly assigns to the DSI load the obligation to be available as a reserve. Fidelity to the statute requires that this congressional determination be upheld.

c. While we believe that this case may be resolved in favor of the BPA Administrator's decision solely on the basis of the statutory language, further support for our position is provided by the legislative history—as even the court of appeals acknowledged. Pet. App. A10 & n.7.

The manner in which the new DSI contracts dispose of the top quartile was expressly considered and approved by Congress. In response to an inquiry from the Chairman of the Subcommittee on Water and Power Resources of the House Committee on Interior and Insular Affairs, BPA's Administrator explained how the DSIs' load would be served (Pet. App. I23). The language of the Administrator's response was adopted verbatim in the House Interior and Insular Affairs Committee report (H.R. Rep. 96-976, *supra*, Pt. II, at 48-49; Pet. App. E106-E107)

⁷ Aside from the additional outlays that would be required by the alternatives of building new facilities or purchasing power on the open market, there is a further cost involved in eliminating the top quartile reserve from the DSI allocation. The DSIs pay higher rates than preference customers (DSIs pay 26.8 mills per kilowatt hour for top quartile nonfirm energy as opposed to respondents' standard rate for nonfirm energy of 18.5 mills, the spill rate of 11 mills, or the coal displacement rate of 7 mills; BPA, U.S. Dep't of Energy, WP-83-A-02, *Administrator's Record of Decision, Rate Schedules D-10-12 & D-44-45* (Sept. 1983)).

and approved by the former and present Chairmen of the Senate Committee on Energy and Natural Resources. 126 Cong. Rec. 30180, 30187 (1980); Pet. App. J2. Against this background of congressional ratification, the language of the House Interior and Insular Affairs report was copied virtually verbatim in the Administrator's decision (46 Fed. Reg. 44348 (1981)) and the new DSI contracts (Pet. App. H1). In these circumstances, it is extraordinary to hold, as the Ninth Circuit did, that BPA's faithful adherence to express congressional intent was unreasonable.

d. In our view, the case boils down to two straightforward propositions. First, that Congress intended that the challenged provisions of the new DSI contracts take their present form. This much is clear from the statutory language and the legislative history. Second, that BPA's construction of the Regional Act is faithful to congressional intent, and even if there is some question on this point, BPA's view is a reasonable one that is entitled to judicial deference. See *American Paper Institute, Inc. v. American Electric Power Service Corp.*, No. 82-34 (May 16, 1983), slip op. 20.

2. The principal thrust of the arguments put forward by respondents and the amici curiae relates not to the Regional Act's treatment of the DSIs, but rather to the statutory preservation of "preference" for public utilities.

The fact is, however, that the present case does not call into question the principle of "preference" in all its various statutory permutations in other legislation. See APPA Am. Br. 4. Indeed, the preference issue need never be reached in deciding this case. "Preference" is a statutory creation that has meaning only when there are competing demands for the same power. In the Regional Act, Congress established a statutory plan of allocation that accommodates competing demands at least for the 20 year duration of the initial contracts.⁸ See 126 Cong.

⁸ Sections 5(d)(1)(B) and (g)(1) require BPA to offer initial long-term contracts to existing DSI customers. Moreover, Section

Rec. 30179 (1980) (remarks of Sen. Jackson) (the Regional Act is intended to ensure that "the allocation issue is resolved promptly through legislation"); Pet. App. J1; 126 Cong. Rec. 29801 (1980) (remarks of Rep. Kazen) ("uncertainties [as to allocation of power] can only be resolved through enactment of the legislation before us today"). By granting the DSIs a statutory entitlement to the equivalent amount of power involved in their 1975 contracts, this portion of BPA's sales is now not subject to competing demands and is accordingly beyond the scope of the preference clause. Thus, as the private utility respondents acknowledge (IOU Br. 3 n.7), if Congress committed this power to the DSIs, the case is over. As we have said, our primary submission is that the Regional Act, construed in light of the clear statements by Senator Jackson and Congressman Kazen,⁹ embodies a legislative allocation scheme that moots any question of the preference.

If the preference issue is reached, it must be placed in its proper perspective. Power generated by federal power marketing agencies such as BPA is federal property. Accordingly, Congress may dispose of this property as it desires. *Ashwander v. TVA*, 297 U.S. 288 (1936). Thus,

5(g)(7) (16 U.S.C. 839c(g)(7)), which deems BPA to have sufficient resources for entering into such contracts, also refers only to *initial* contracts. Thus, while BPA is authorized by Section 5(d)(1)(A) to offer subsequent contracts, such future contracts are not mandated and will be offered only if there are no competing applications for power by preference entities. See Pet. App. M1-M2.

⁹ Senator Jackson was Chairman of the Senate Committee on Energy and Natural Resources (see Pet. App. F1); Congressman Kazen was Chairman of the Subcommittee on Water and Power Resources of the House Committee on Interior and Insular Affairs (see Pet. App. I1). Similar expressions of the legislative intent to establish a statutory scheme of allocation are contained in the committee reports of both houses of Congress. *E.g.*, H.R. Rep. 96-976, *supra*, Pt. I, at 26-27; Pet. App. D64-D65; H.R. Rep. 96-676, *supra*, Pt. II, at 26; Pet. App. E67; S. Rep. 96-272, *supra*, at 14-16; Pet. App. F34-F35. See also Pet. App. G2-G3, L1 (remarks of Rep. Foley) ("[t]he bill's allocation system is the heart of the regionally-negotiated 'peace' settlement * * *").

Congress may allocate federal power among preference and nonpreference entities in accordance with its view of the public interest in the specific instance. And, on numerous occasions Congress has determined that the public interest is best served by sales to nonpreference customers or by creation of a "preference within a preference" favoring a specified geographic area (including nonpreference users in the area) over public entities otherwise entitled to preference.¹⁰

¹⁰ The Niagara Power Project Act, 16 U.S.C. 836 *et seq.*; Boulder Canyon Project Act, 43 U.S.C. (& Supp. V) 617 *et seq.*; and the Tennessee Valley Authority Act of 1933 (TVA Act), 16 U.S.C. 831 *et seq.*, all contain provisions that have been found to dispose of federal power to nonpreference entities. Boulder Canyon Project Act provisions requiring that nonpreference customers be offered contract renewals notwithstanding preference are discussed in *Citizens Utilities Co. v. United States*, 149 F. Supp. 158 (Ct. Cl.), cert. denied, 355 U.S. 892 (1957). TVA Act provisions that justified TVA in denying a preference customer the opportunity to serve an industrial customer and let TVA serve the load directly are discussed in *Volunteer Electric Cooperative v. TVA*, 139 F. Supp. 22 (E.D. Tenn. 1954), *aff'd*, 231 F.2d 446 (6th Cir. 1956). The Niagara Power Project Act offers detailed provisions regarding power allocation. It divides the power produced at the Niagara Project equally among preference and nonpreference customers. 16 U.S.C. 836(b). See *Municipal Electric Utilities Association v. Power Authority*, 21 F.E.R.C. ¶ 61,021, at 61,130 (Oct. 13, 1982). Finally, BPA markets power from the Hanford Steam Plant, a project that utilizes by-product steam to generate electricity. Fifty percent participation in the project must be offered to private utilities. Act of Sept. 26, 1962, Pub. L. No. 87-701, § 112(e), 76 Stat. 604.

Statutes that create a preference within a preference are also common. The Niagara Power Project Act provides that 80% of the preference power is to be provided to public bodies of the State of New York "within * * * economic transmission" distance of the project. 16 U.S.C. 836(b)(2). BPA itself markets power pursuant to two statutes that create geographic preferences. The Hungry Horse Dam Act, 43 U.S.C. 593a, as reaffirmed by Section 12(f) of the Regional Act, 16 U.S.C. 839g(f), creates a "Montana reservation" that requires BPA to make the electric energy generated at the project available "primarily * * * in the State of Montana." The Pacific Northwest Consumer Power Preference Act, 16 U.S.C. 837 *et seq.*, prohibits BPA from selling federal hydro power outside the Pacific Northwest when there is a market for such power within the

Congress has made such an allocation here. And the fact that preference would operate in a manner that differs from its application in other federal statutes was certainly known to Congress and was expressly addressed in Section 10(c) of the Regional Act, 16 U.S.C. 839g(c). See H.R. Rep. 96-976, *supra*, Pt. I, at 34-35, 73-74; Pet. App. D78, D143. For this reason, the Court does not have before it, and has no occasion to decide, the abstract question of "preference" as a Platonic ideal applicable to all federal power legislation. Rather, the case involves the role of preference, if at all, only within the framework of the Regional Act.

b. With respect to the Regional Act, respondents and amici appear to argue (CL Br. 1, 19, 23, 24, 26, 28-29, 43; PPC Br. 1, 5, 7, 9-10, 12, 19, 26; IOU Br. 11; APPA Am. Br. 1, 6 n.15, 7, 9, 19, 20, 26) that the Act reaffirmed preference as to *all* power sold by BPA at *all* times or, alternatively, that preference is reaffirmed as to nonfirm power (APPA Am. Br. 2-4; PPC Br. 11). Both versions of this argument are incorrect.

The assertion that preference extends to all BPA power is contrary to historical fact and to express statutory language. Even prior to the Regional Act, BPA sold power to nonpreference customers such as the DSIs (*e.g.*, the 1975 contracts). Indeed, it has done so since 1939, shortly after passage of the original Bonneville Project Act. See G. Norwood, *DOE-BP-7, Columbia River Power for the People—A History of Policies of the Bonneville Power Administration* 133, 328 (1981). If respondents are correct that preference is an "all-encompassing" (CL Br. 19) concept that applies to all BPA power sales, then

region. This is so even where there is a non-Pacific Northwest preference customer applicant competing with a Pacific Northwest nonpreference customer for purchase of the power. 16 U.S.C. 837-837h. Regional preference was extended in the Regional Act to include thermal power. § 9(c), 16 U.S.C. 839f(c). Both of these Acts reserve to BPA's Pacific Northwest nonpreference customers first priority to power marketed by BPA ahead of competing applications from preference customers in other regions.

presumably BPA could never have sold power to the DSIs (or to privately owned utilities or federal agencies) under contracts that did not allow BPA to terminate sales for three-quarters of the contractual total because of a subsequent preference application. Yet BPA had done just that in the 1975 contracts, and those contracts were certainly known to Congress when it passed the Regional Act.¹¹ Moreover, if preference extends to all power sales by BPA at all times, as respondents suggest, then the express provisions for sales to DSIs (as well as those for IOUs and federal agencies) would be written out of the Act. If respondents are correct, there was no need for the Regional Act at all; Congress could have stopped after reaffirming preference in 16 U.S.C. 839c(a) and even this was unnecessary because it merely repeated the preference that existed under the prior statute. At most, Congress could have authorized BPA to acquire additional resources and otherwise left the system to operate as it had in the past. But, as Congress was well aware, that would not have averted the "civil war" that was raging. See note 2, *supra*. More was required; and more was intended, as the complex statute that comprises 75 pages in the appendix to the petition attests.

In contrast to respondents' myopic focus on the preference clause, BPA's interpretation treats the Regional Act as an organic whole in which each provision has meaning and substance. Thus, the allocation carved out for the DSIs is but one current in the ebb and flow of concessions and benefits created by the Regional Act.¹² Rather than

¹¹ Congress expressly referred to the 1975 contracts in the Regional Act. § 5(d) (1) (B), 16 U.S.C. 839c(d) (1) (B).

¹² As Senator Jackson stated (126 Cong. Rec. 30179 (1980); Pet. App. J1):

The bill before us is the result of a legislative process of consensus and compromise in which an effort has been made at every stage to accommodate the views of every interest group and every member of the Northwest delegation to the maximum extent possible.

a mere reiteration of preference that leaves the position of the public utilities unchanged in every respect and the remaining classes of customers to fend for themselves, the Regional Act offers a thorough and comprehensive legislative solution to the pressing problem of allocation. BPA's position, unlike that of respondents, is the only one that integrates the DSI allocation into the whole statute and the only one that breathes life into all of its provisions. As we have described earlier, BPA's construction comports with the statute's directive and authorization that sales be made to preference customers, to privately-owned utilities, to federal agencies and to DSIs; and it does so in a way that preserves the preference for all uncommitted power remaining. Under BPA's implementation of the Act, the public utilities will continue to have a preference for all power not allocated elsewhere by Congress and the firm loads of the public utilities are protected by the reserves created by the DSIs' top quartile. Finally, unlike respondents' view, in which Section 5(f) (16 U.S.C. 839c(f)) is written out of the Act, BPA's construction blends that Section into the structure of the Act by providing that surplus sales are made only after BPA has fulfilled its obligations to all customers, including DSIs.¹³ In short, BPA's is the only interpretation

¹³ Respondents greatly exaggerate (CL Br. 24-27; APPA Am. Br. 14-15) the role of their opposition to Section 5(f) and the congressional response. It is true that APPA opposed S. 3418, an earlier version of the legislation that eventually passed, because it believed that Section 5(d) (which became Section 5(f) in the Regional Act) "subordinates the preference provisions of the Bonneville Project Act to new rights created for private power companies and direct service industries." *Pacific Northwest Electric Power Supply and Conservation Act: Hearings on S. 2080 Before the Senate Comm. on Energy and Natural Resources, 95th Cong., 2d Sess., Pt. 2, at 1069 (1978) (testimony of Alex Radin)*. APPA also urged Congress to clarify that sales to nonpreference customers would be only from surplus power, and that all power sales would be subject to preference.

Congress accepted only part of the APPA proposal. While Section 5(a) was revised to state that sales were subject to the prefer-

that would enable the Act to be implemented as it was intended. But even if other interpretations are plausible, it is enough that BPA's reading of the Act is a reasonable one. We deal here with a complex statute as to which the views of the implementing agency should be accorded deference.

c. The suggestion that the Regional Act mandates preference for all nonfirm power fares no better. It offers no explanation for the statutory definition of the public utilities' preference in terms of "electric power to meet the *firm power* load of such public body." § 5(b) (1), 16 U.S.C. 839c(b) (1) (emphasis added). And it runs directly counter to Congress's statement that it was "not intended" for reserves to be "used to protect other than firm loads." S. Rep. 96-272, 96th Cong. 1st Sess. 23 (1979); Pet. App. F47-F48.

3. Respondents and amici make a few additional assertions that warrant brief response.

a. Respondents argue (CL Br. 14 n.36) that the new DSI contracts are not needed to underwrite the cost of the residential exchange program because those costs are instead shouldered in large part by the public utilities. To support this contention the public utility respondents make the incorrect and misleading assertion that they are paying \$250 million of the costs of the residential exchange program under BPA's current rates. This figure greatly distorts the actual impact of the residential exchange on the public utilities because it reflects only one


ence provisions of the Bonneville Project Act, the offending provisions of Section 5(f) were retained, along with statutory language requiring sales to nonpreference customers. Moreover, the Senate Committee on Energy and Natural Resources added to the legislation, for the first time, the "deemer" concept (Section 5(g) (7): "[BPA] shall be deemed to have sufficient resources for the purpose of entering into the initial contracts * * *") which was intended to resolve any competing applications for power by preference entities.

Congress therefore, in one of the myriad compromises required to solve the pending energy shortage, struck a balance between APPA's all-or-nothing approach and the pending bill, which did not mention preference.

step in BPA's cost allocation process. That is, it reflects the *gross* cost of exchange resources allocated to the entire Priority Firm Power Class. But the public utilities represent only one-half of the power load of that class. Taking into account other factors overlooked by the respondents results in an accurate calculation of the impact of the exchange program, which is approximately \$3 million.¹⁴

Their argument is also incorrect as a matter of statutory interpretation. See Section 7(c) (1) (A) of the Act, 16 U.S.C. 839e(c) (1) (A). Moreover, the House committee report states that the DSIs "will also pay significantly higher rates * * * [to] permit the Administrator to enter into * * * [the] exchange" program. H.R. Rep. 96-976, *supra*, Pt. I, at 29; Pet. App. D69.

Before the Regional Act, the rates for DSIs and public utilities were essentially the same because BPA allocated a single pool of power costs to all firm power customers.¹⁵ Finklea, *Bonneville Power Administration Ratemaking: An Analysis of Substantive Standards and Procedural Requirements*, 13 *Env'tl. L.* 929, 941 (1983). On the other hand, under BPA's present rates, as approved on an interim basis by the Federal Energy Regulatory Commis-

¹⁴ First, the actual impact on the Priority Firm rate class is not the total exchange costs of \$269,470,000 (BPA, U.S. Dep't of Energy, *Cost of Service Analysis*, Tables 6, 7, 8 (Sept. 1983)), but is the difference between the exchange costs and the cost of an equal amount of less-expensive Federal Base System power, a net cost of \$74,572,000. Second, the public utilities represent only 46.67% of the Priority Firm class. Thus, their share of the increased cost is \$34,756,000. Finally, by participating in the exchange program, the public utilities receive benefits of \$31,426,000, resulting in a net cost of \$3,322,000 (*id.* at Table A-1). 

¹⁵ In fact, the DSIs' rate was less than the rate for firm power sales to publicly-owned utilities, to reflect lower unit costs to serve the DSIs. It was less costly for BPA to serve the DSIs because of their high load factor and the restriction rights BPA could exercise on sales of power to the DSIs to protect firm loads. BPA's 1979 wholesale power rate for publicly-owned utilities was 7.25 mills per kilowatt hour, while BPA's rate for sales to the DSIs was 6.7 mills per kilowatt hour.

sion, the DSIs pay 4.8 mills per kilowatt hour more than the public utilities. BPA, U.S. Dep't of Energy, *Issue Backgrounder: BPA's Electric Power Rates* (Oct. 1983). The primary reason for this difference is that BPA recovers the bulk of the exchange program costs from the DSIs.

b. Respondents claim that BPA's interpretation of the DSI load has changed by citing (CL Br. 11 n.29) a 1956 opinion of the Regional Solicitor stating that preference applies to nonfirm power. By its terms, however, that opinion assumes that the nonfirm power under discussion has not been allocated and is still available for allocation pursuant to preference. By contrast, the nonfirm power at issue here has been allocated—by unambiguous statutory directive. And power that has already been allocated is not subject to a claim of preference. See *BPA's Obligations to Industrial Customers*, Op. of Regional Solicitor (Oct. 31, 1974). The 1974 opinion, which involved power previously committed by contract, concluded that BPA will not interrupt service to an industrial customer served under an existing contract to provide power to a new preference entity. Accord, *City of Anaheim v. Kleppe*, 590 F.2d 285 (9th Cir. 1978). The conclusion drawn in 1974, which was available to Congress as part of the administrative background for the Regional Act, is more forcefully applicable here, where the underlying allocation has been made by Congress.

c. It is suggested (APPA Am. Br. 17-18) that BPA's construction of the Regional Act would frustrate conservation. In support of this contention, amicus APPA cites a General Accounting Office recommendation that BPA should gradually decrease the amount of power allocated to DSIs to the amount needed to run modernized plants.

This argument is substantially undercut by APPA's concession (APPA Am. Br. 18) that "[t]he committee did not accept the GAO recommendations designed to reduce the DSI's entitlements in the precise manner suggested." This is an understatement. Not only did Con-

gress object to "the precise manner suggested" by GAO, it rejected GAO's proposals outright. Instead of reducing the DSI entitlement, as GAO advised, the Regional Act directs BPA to provide the DSIs the same amount of power that was provided under the 1975 contracts. 16 U.S.C. 839c(d) (1) (B).

The legislative history demonstrates why Congress rejected GAO's suggestion. In hearings before the House Committee on Interstate and Foreign Commerce, GAO Deputy Director Douglas McCullough urged that "[b]efore Bonneville is authorized to offer the industrial customers new long-term contracts, we believe the bill should be amended to assure industrial conservation of electricity * * *." *Pacific Northwest Electric Power Planning: Hearings on H.R. 3508 and H.R. 4159 Before the Subcomm. on Energy and Power of the House Comm. on Interstate and Foreign Commerce, 96th Cong., 1st Sess. 170 (1979)*. In response, counsel for the DSIs stated that the conservation provisions of H.R. 3508 applied equally to all BPA customers, including DSIs, and that the primary incentives for DSI conservation were greatly increased rates and Congress's fixing for 20 years an upper limit on the amount of power that an existing DSI could receive. *Id.* at 321.

The committee considered the arguments and rejected the GAO position. Instead, it applied the Act's conservation provisions equally to all customers. The committee report notes first that DSIs should "do their part." The report then states that the fixed amounts of power and the increased rates will provide the incentive for DSI conservation: "This limitation [fixing an upper limit on the amount of power unless additional sales are approved by the Regional Council] and the amount of power available to DSI's should serve as significant incentives for the DSI's to conserve that power for the purpose of additional DSI production." H.R. Rep. 96-976, *supra*, Pt. I, at 63; Pet. App. D124-D126.

The Act as finally passed recognized that the economic market place and not the law would be the driving force

behind DSI conservation. The current rates are more than 50% higher than anticipated for fiscal year 1984. S. Rep. 96-272, *supra*, at 70; Pet. App. F90; BPA, U.S. Dep't of Energy, *Issue Backgrounder: BPA's Electric Power Rates* (Oct. 1983). Moreover, the Act's only specific reference to DSI conservation reflects that DSI service and DSI conservation are not linked. Instead, the Regional Council is directed to study "conservation measures reasonably available to direct service industrial customers and other major consumers * * * and make an analysis of the estimated reduction in energy use which would result from the implementation of such measures as rapidly as possible, consistent with sound business practices." § 4(e)(4), 16 U.S.C. 839b(e)(4). The study that Congress provided is far removed from the affirmative obligation that APPA proposes.

d. Respondents dispute (CL Br. 32-33, 41) our position that one of the benefits the DSI obtained in the Regional Act was increased quality of top quartile service. In particular, they point (*id.* at 41 n.83) to testimony before Congress by an attorney representing the DSIs in which he spoke of a reduction in the quality of DSI power. This testimony has been taken out of context. In fact, it refers not to the top quartile—the only portion of the DSI load at issue in this case—but, rather, to new restriction rights that the Act imposes on the *second* quartile. Under the Regional Act, BPA may protect its firm loads against shortages caused by power plant delays, conservation shortfalls, and unpredicted power plant outages by new rights to interrupt the DSI's second quartile. See H.R. Rep. 96-976, *supra*, Pt. II, at 48-49; Pet. App. E106-E107. Thus, the second quartile, which provided firmer power to the DSIs under the 1975 contracts, is now subject to interruption under increased circumstances. See Pet. App. H1-H9; See J.A. 21. To this extent the second quartile provides a lower quality of power than it did before. See S. Rep. 96-272, *supra*, at 28; Pet. App. F57; H.R. Rep. 96-976, *supra*, Pt. I, at 62; Pet. App. D123-D124; H.R. Rep. 96-976, *supra*, Pt.

II, at 48; Pet. App. E106-E107. Cf. *Pacific Northwest Electric Power Supply and Conservation Act: Hearings on S. 2080 Before the Senate Comm. on Energy and Natural Resources*, 95th Cong., 2d Sess. Pt. 1, at 152 (1978) (testimony of Harry Helton of Reynolds Metals Co.).

While this testimony does not detract from our position concerning the *top* quartile, it does point out that Congress clearly intended that some changes be made in DSI service under the Regional Act. See H.R. Rep. No. 96-9~~A~~, *supra*, Pt. I, at 62-63; Pet. App. D124 ("The Committee amendment calls for new DSI contracts. The amendment does not require that they be identical to the current contracts concerning reserves, credits, and other matters, but provides BPA with considerable flexibility to prepare and negotiate contracts and adopt rates that insure that conditions relating to reserves are not so stringent as to render the reserves provided by the DSI's largely ineffective.").

This goes a long way towards showing that respondents are incorrect in urging that the Regional Act simply maintained the status quo for DSIs. Changes were clearly made, as they were for all customers, in order to fashion a legislative allocation scheme that resolved, as Congress saw fit, the needs of competing customers. These changes were made as part of a complex overhaul of power allocation in the Pacific Northwest in the manner Congress deemed most effective to ensure that all classes of customers received their full power requirements from BPA.

For the reasons stated here and in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

REX E. LEE
Solicitor General

DECEMBER 1983

No. 82-1071

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ALEXANDER L. STEVAB,
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

ALUMINUM COMPANY OF AMERICA, *et al.*,
Petitioners,

v.

CENTRAL LINCOLN PEOPLES UTILITY DISTRICT, *et al.*,
Respondents.

and

PETER JOHNSON, as Administrator of the BONNEVILLE
POWER ADMINISTRATION, Department of Energy, and
DONALD PAUL HODEL, as Secretary of the DEPARTMENT OF
ENERGY, and the UNITED STATES OF AMERICA,
Respondents.

On Writ Of Certiorari To The United States
Court Of Appeals For The Ninth Circuit

**BRIEF AMICUS CURIAE BY THE
AMERICAN PUBLIC POWER ASSOCIATION
AND THE
NATIONAL RURAL ELECTRIC COOPERATIVE
ASSOCIATION IN SUPPORT OF CENTRAL LINCOLN
PEOPLES UTILITY DISTRICT, ET AL., SEEKING
AFFIRMANCE OF THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT.**

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QUESTION PRESENTED

Whether, in accordance with the Ninth Circuit's construction, the Pacific Northwest Electric Power Planning and Conservation Act requires that Respondents' historical rights of preference with regard to nonfirm power be retained in their entirety.

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OPINION BELOW

The Ninth Circuit's Opinion, as amended, is reported at 686 F.2d 708.

JURISDICTION

The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). The Ninth Circuit's Opinion was rendered on April 6, 1982 and thereafter amended by Order dated September 7, 1982. A timely petition for rehearing was denied on September 27, 1982, and a petition for certiorari was filed thereafter within 90 days. The Court entered its Order granting the petition for writ of certiorari on March 28, 1983.

STATEMENT OF THE CASE

The Bonneville Power Administration (hereinafter, "BPA") was created by Congress in 1937 to market electricity produced at certain federally-owned hydroelectric projects in the Pacific Northwest. The Agency's enabling statute contained an explicit provision setting forth priorities governing power allocation:

"In order to insure that the facilities for the generation of electric energy at the Bonneville Project shall be operated for the benefit of the general public, and particularly of domestic and rural customers, the administrator *shall at all times*, in disposing of electric energy generated at said project, give preference and priority to public bodies and cooperatives." (Emphasis added) 16 U.S.C. § 832c(a).

In accordance with its statutory mandate, BPA has consistently granted priority to publicly-owned utilities and cooperatives when formulating its power marketing plans. BPA adhered to its statutory responsibility to meet the needs of its publicly-owned customers before selling electricity to privately-owned utilities and direct service industrial customers (hereinafter, "DSIs").

BPA sells two types of energy to its preference customers, "firm" and "nonfirm."¹ The Court below correctly described the two as follows:

"Nonfirm energy is the energy in excess of that which BPA can reliably plan on producing and is therefore provided only when such an excess exists. Firm energy is the energy that BPA can reliably plan on producing and must be sufficient to serve BPA's firm loads."²

Publicly-owned utilities and cooperatives have always received priority from BPA in the sale and distribution of nonfirm energy. This policy has been deemed by the Regional Solicitor to be statutorily mandated.³

In the mid-1970's, increased energy demands and the lack of potential dam sites forced BPA to conclude that the Agency would no longer be able to meet the growing demand for electricity from its federally-owned installations. Accordingly, BPA notified the DSIs that their contracts would not be renewed, and informed the preference customers that the amount of federal power which would be available was insufficient to meet their needs. The Agency then began investigating administrative methods of allocation which would apportion the scarce resources among the preference entities⁴.

Fearing a potential "regional civil war" over low cost power and faced with BPA's inability to fully serve its preference customers,⁵ Congress intervened by enacting the Pacific Northwest Electric Power Planning and Conservation Act⁶

¹ Nonfirm power which is sold to public bodies and cooperatives in the Pacific Northwest is also called "secondary" energy.

² 686 F.2d at 710.

³ See pps. 19-20, *infra*.

⁴ See House Committee on Interstate and Foreign Commerce Report, H.R. REP. 976 (I), 96th Cong., 2d Sess. 24-25 (1980).

⁵ *Id.* at 27.

⁶ 16 U.S.C. §§ 839-839h.

(hereinafter, "Regional Act"). As is discussed fully in this submission and in Respondents' Brief, the Regional Act explicitly preserves all rights of preference which were previously accorded to publicly-owned utilities and cooperatives pursuant to the aforementioned provisions of the Bonneville Project Act.⁷

After passage of the Regional Act, BPA entered into industrial sales contracts which eliminate respondents' statutory entitlement to preference in the allocation of nonfirm power.⁸ The contracts were immediately challenged in a suit filed by the publicly-owned utilities. The Court below unanimously held that the plain meaning of the Regional Act preserves in all respects the rights of priority which had been previously set forth in the Bonneville Project Act.⁹

INTEREST OF THE AMICI CURIAE

This amicus brief is submitted on behalf of the American Public Power Association (hereinafter, "APPA") and the National Rural Electric Cooperative Association (hereinafter, "NRECA").¹⁰ The American Public Power Association is the national service organization representing over 1,750 local public power systems located throughout the United States. Its membership includes municipally owned electric systems, distinct units of local government such as public power and irrigation districts, and state agencies such as the Public Service Authority of South Carolina. These publicly owned systems distribute 15% of the nation's electricity to 13.5% of the population.

⁷ See n.15, *infra*, for the language of the preference saving provisions in the Regional Power Act.

⁸ 46 Fed. Reg. 44348 (1981).

⁹ 686 F.2d at 715.

¹⁰ All parties to this suit have consented to this filing. Written copies of said Consent have been submitted to the Clerk's office.

NRECA is a non-profit national service organization for some 1000 rural electric cooperatives which provide central station electricity to nearly 25 million consumers in 46 states. Rural electric cooperatives distribute roughly 11% of the nation's electricity and serve 10% of the population. As cooperatives owned by the consumers of their electricity, NRECA members seek to provide a reliable source of energy at the lowest possible cost.

The interests of the two organizations in this case are based in part on concern for the welfare of preference customers situated in the Pacific Northwest,¹¹ and in part on the duty to protect the statutory rights of preference wherever they are challenged. The interest of preference purchasers in the Pacific Northwest is clear. Petitioners seek to overturn the statutory right of priority to nonfirm power which respondents have received for years. Reversal of the opinion of the Court below would result in a significant increase in the cost of energy purchased by municipalities, public utility districts and cooperatives which constitute a portion of the membership of APPA and the NRECA.

Although the Ninth Circuit was interpreting a statute which applies only to the Pacific Northwest region, the APPA and NRECA still have a strong interest in this case on the basis of their historical role as champions of the rights of publicly owned utilities. More than thirty statutes enacted by Congress over the past 75 years have provided a preference for public power and rural electric cooperative systems in the purchase of surplus power generated at hydroelectric projects constructed and operated by the Federal Government.¹² APPA and NRECA have consistently supported the adoption of 'preference

¹¹ BPA serves 116 preference customers.

¹² See, e.g., Federal Water Power Act of 1920, 16 U.S.C. § 800(a) ("... the Commission shall give preference to applications by States and municipalities . . ."); Tennessee Valley Authority Act of 1933, 16 U.S.C. § 831 ("... in the sale of such current, the Board shall give

clauses' by the Congress and have defended the preference rights of public power systems in numerous legal proceedings.

Consistent with their historical roles as staunch advocates of preference, these organizations directly participated in the legislative process which culminated in the enactment of the Regional Act. Spokesmen for both APPA and NRECA testified before the Senate Committee on Energy and Natural Resources on the manner in which early drafts of the legislation dealt with preference rights.¹³ A major purpose in submitting this brief is to ensure that the Court is fully aware of the assurances which they received from Congress on these issues¹⁴ and the actions which Congress took at the time the legislation was being developed.

In addition to preserving these assurances, APPA and NRECA feel compelled to challenge the characterization of preference entitlements upon which petitioners' entire argument is premised. By contending that Congress established a scheme for power allocation which eliminated the previous preference and priority to nonfirm energy, the DSIs and BPA are attempting to relegate the preference provisions of the Act to a discretionary guideline which can be altered or diminished

preference to states, counties, municipalities, land cooperative organizations of citizens or farmers . . . all contracts made with private companies for the sale of power . . . shall contain a provision authorizing the Board to cancel said contract upon five years notice . . ."); Flood Control Act of 1944, 16 U.S.C. § 825s ("Preference in the sale of such power and energy shall be given to public bodies and cooperatives").

¹³ *Pacific Northwest Electric Power Supply and Conservation Act: Hearings on S.2080 and 3418 before the Senate Committee on Energy and Natural Resources*, 95th Cong., 2d Sess., 1068-69 (APPA), 1103-04 (NRECA). See also pps. 14-15, *infra*.

¹⁴ The express intent of Congress to preserve all rights of preference as demanded by APPA and NRECA at the time is supported at p. 15, *infra*.

as the Agency sees fit. The rights of preference which are at issue in this case are *not* subject to Agency discretion. They are mandated by explicit statutory language which is binding on the Agency. Further, the Regional Act specifically states that all such rights of preference remain unaffected. As long-standing proponents of these rights of priority, APPA and NRECA hope to assist the Court by pointing out the implicit defects in petitioners' attack on preference. In short, the amici assert an interest in preventing the statutory entitlements of their members from being illegally, unjustifiably and arbitrarily withdrawn.

SUMMARY OF ARGUMENT

This case presents a straightforward problem of statutory construction. BPA and the DSIs claim that Congress, in enacting the Regional Power Act, imposed a precise formula for allocating power in the Northwest, including the specific requirement that DSIs receive nonfirm power in order to meet their first quartile requirements before any nonfirm power would be made available to public preference entities.

Central Lincoln and the other public utilities involved in the case claim that Congress did not make such an allocation and that it expressly continued the BPA preference for all classes of power for public agencies and cooperatives.

The statute is indeed explicit about the preservation of the preference of public agencies and cooperatives.¹⁵ The legisla-

¹⁵ The Act provides:

"All power sales under this Act shall be subject at all times to the preference and priority provisions of the Bonneville Project Act of 1937 (16 U.S.C. 832 and following) and, in particular, sections 4 and 5 thereof." 16 U.S.C. § 839c(a) (Section 5(a)).

"Nothing in this Act shall alter, diminish, abridge, or otherwise affect the provisions of *other* Federal laws by which public bodies and cooperatives are entitled to preference and priority in the sale of federally generated electric power." 16 U.S.C. § 839g(c) (Section 10(c)) (emphasis added).

tive history is equally straightforward and convincing on the Congressional intention to preserve all preference rights.

When it appeared that Congress, in attempting to resolve the "Civil War" which threatened to break out among BPA's customers, was considering legislation that did not protect the preference clause, APPA and NRECA entered the Congressional debates to argue that the preference clause which has existed in various forms since 1887¹⁶ should not be violated and eroded. APPA and NRECA, on behalf of their hundreds of members who regard preference as their life blood, were not concerned only with protecting preference to firm power. They were concerned with the disposition of all power marketed by BPA. Their understanding that preference does not vary on the basis of the type of power being allocated was consistent with both a prior judicial interpretation on the reach of the preference clause¹⁷ and with BPA's existing practice in the sale of nonfirm energy.

The position advocated by APPA and NRECA was accepted by the principal authors of the Regional Act and resulted in subsections 5 (a) and 10(c) being adopted. This view was corroborated by Representative Swift, who introduced H.R. 8157, which was ultimately adopted:

"The bill avoids the administrative reallocation problem by authorizing BPA to add to its power supply so that it can meet the needs of all its customer classes. *The bill does so under power supply and rate provisions that are acceptable to all classes of BPA customers and that fully protect the preference rights of public bodies and cooperatives.*"

¹⁶ See n.20, *infra*.

¹⁷ The Ninth Circuit has made it clear that preference rights do not vary on the basis of what type of energy is being allocated. *Arizona Power Pooling Association v. Morton*, 523 F.2d 721, 727 (9th Cir. 1975) (preference applies fully to interim non-federal thermal energy which is purchased for sale by the federal agency).

Representative Swift went on to say,

"The bill does not violate the preference clause: The bill has been amended to insure full protection of the traditional preference rights of public bodies and cooperatives. The Public Power Council, the National Rural Electric Cooperative Association, and the American Public Power Association are in full agreement that the bill in its present form protects preference."

126 CONG. REC. H9851, Sept. 29, 1980 (remarks of Rep. Swift) (emphasis added).

If the authors of the legislation had been aware that the interpretation asserted by the DSIs and BPA resulting in a diminution of preference rights was a possible construction of their language, they would have withdrawn their support for the bill and almost certainly there would have been no legislation enacted.¹⁸

Notwithstanding these facts, BPA and the DSIs suggest that their interpretation would "only" affect nonfirm power and that it was the intent of Congress to simply provide a minor amendment to the otherwise inviolate preference preserved by subsections 5(a) and 10(c). Preservation of preference was simply too important to the participants and too central to the overall solution to the energy problems of the Pacific Northwest to have been modified through obscure or artfully crafted interpretations of bits and pieces of statutes. If Congress had intended to alter drastically the character of the preference clause, it would have done so only after a full scale debate. Their decision to alter preference would have been crystal clear, albeit highly controversial.

The statutory language on preference is direct, simple, and unambiguous. The legislative history supports and sustains the statutory language, as does reason in making the Act workable. And, most significantly, the statutory provisions and the legislative history further and implement solid public policy which Congress and the Nation have consistently supported.

¹⁸ See pps. 13-15, *infra*.

ARGUMENT

I. REVERSAL OF THE PREFERENCE FOR PUBLIC BODIES AND COOPERATIVES TO NONFIRM ENERGY WOULD BE CONTRARY TO THE PUBLIC INTEREST.

Sections 5(a) and 10(c) of the Regional Power Act preserve in all respects the preference rights accorded to public bodies and cooperatives under the Bonneville Project Act and other federal reclamation statutes.¹⁹ Those savings provisions thereby retain a long legacy of Congressional policy determinations relating to the allocation of electric power produced at federal hydroelectric facilities. The considerations which have produced strong and consistent Congressional support for the preference concept remain compelling in the context of today's power market requirements and practices.

In the past century, Congress has consistently incorporated the concept of preferential treatment for public bodies into statutes authorizing the distribution and use of public water resources.²⁰ This preferential allocation of federally financed hydroelectric power to the general public derives ultimately from the Commerce Clause of the United States Constitution.²¹ Additionally, the preference for public bodies

¹⁹ See n.15, *supra*.

²⁰ See, e.g., Desert Land Act of March 3, 1877, 19 Stat. 377; the Homestead Act of 1891, 43 U.S.C. § 162; the Raker Act of 1913, 38 Stat. 242, 245; Federal Water Power Act of 1920, 16 U.S.C. § 800; Boulder Canyon Act of 1928, 43 U.S.C. § 617d(c); the Tennessee Valley Authority Act of 1933, 16 U.S.C. § 831; Rural Electrification Administration Act, 7 U.S.C. § 904; the Bonneville Project Act, 16 U.S.C. §§ 832-8321; the Fort Peck Project Act, 16 U.S.C. § 833; Reclamation Act of 1939, 43 U.S.C. § 485h(c); Water Conservation and Utilization Act, as amended, 16 U.S.C. § 590z-7; Flood Control Act of 1944, 16 U.S.C. § 825s; River and Harbor Act of 1945, 33 U.S.C. § 544b; Eklutna Project Act, 48 U.S.C. § 312(a).

²¹ *Gibbons v. Ogden*, 22 U.S. 1 (1824).

implements the national policy of dispersing the benefits of Federal property rights to the public rather than to private profit-seeking entities.²²

The preference provisions of the Bonneville Project Act of 1937 and the relevant legislative history implement and ratify these policy considerations by unequivocally placing public bodies and cooperatives ahead of private industry with respect to power allocation.²³ The Act instructs the Administrator to market power in a manner which at all times gives preference and priority to public bodies and cooperatives, 16 U.S.C. § 832c(a), so that facilities will be operated "for the benefit of the general public, and particularly of domestic and rural customers." *Id.* Public entities seeking power allocations are given time to obtain financing and construct transmission facilities necessary to deliver the power to their systems before power can be allocated to competing private applicants. 16 U.S.C. § 832c(d).

In enacting these far-reaching preference provisions, Congress sought to prevent private industry from monopolizing the benefits of the Bonneville project.²⁴

"[The preference] provisions were intended to prevent federal power from being contracted to a small area or to an overly limited number of wholesale customers when

²² Fereday, *The Meaning Of The Preference Clause For Hydroelectric Power Allocation Under The Federal Reclamation Statutes*, 9 *Env't'l L.* 601, 612 (1979).

²³ See p. 1, *supra*.

²⁴ This desire to prevent private industry from receiving inordinate benefits from the expenditure of tax dollars was in fact pointed directly at one of the industries which is a principal petitioner in this case. In debate on the bill, Congressman Pierce of Oregon commented on the aluminum companies as follows:

"Such an industry, absorbing all the Bonneville output, would bring little advantage to the Pacific Northwest and probably would employ but few men because so largely automatic." He further

there are others who desire the energy. Like the TVA Act before it, the Bonneville Act was intended to place industry in a category junior to preference customers . . ." *Fereday, The Meaning of the Preference Clause In Hydroelectric Power Allocation Under the Federal Reclamation Statutes*, 9 *Env'tl L.* 601, 630-31 (1979).

The House Report on the Bonneville Project Act was crystal clear in expressing the view that the preference clause was intended to put preference entities ahead of industry in the distribution and sale of the project's hydropower:

"No contract for the sale of electrical energy to any private business interest shall be entered into until the Federal Power Commission has given full consideration to the actual or potential needs and demands of the public agencies and cooperative organizations." H.REP. No. 2955, 74th Cong., 2d Sess. 3 (1937).

The preference provisions thus were originally intended to prevent the direct service industries from gaining undue access to the federal hydroelectric energy. It is precisely this access which petitioners seek to achieve in this appeal. In effect, they argue that a century of Congressional policy and the Regional Act's preference-saving provisions should be ignored, and that electricity consistently earmarked as "public property" should be channeled to them. No statute rescinding preference has been cited, and no rationale for ignoring sections 5(a) and 10(c) of the Regional Power Act has been presented. The DSIs are substantial beneficiaries of the Regional Power Act to the extent they are assured of continued availability of the same amount of power to which they were entitled

pointed out the situation in New York, where up to 90 percent of the supposedly public power output was under contract to private industry, mostly aluminum companies. He cautioned Congress to avoid legislative standards which would allow these interests "to absorb the entire output of BPA power" and stressed that the marketing of Bonneville power "carries also the idea of prevention of monopolization of this energy by limited groups and localities," 81 *CONG. REC.* 4434 (1937).

under the pre-1975 contracts, but Congress did not, directly or indirectly, give them more than those contracts entitled them to receive.

Among other objectives, the preference provisions in the Bonneville Project Act were intended to guard against DSIs, primarily aluminum companies, garnering a share of BPA power out of proportion to their contribution to the region as measured by employment. Apparently this fear was justified. As of 1977, the aluminum industry in the Northwest accounted for 25 percent of the region's total electricity consumption and nearly a third of Bonneville's sales, yet the industry provided employment for only 0.5 percent of the region's work force.²⁵ These figures supply a rationale for upholding preference rights, not eroding them.

In their Petition For Writ of Certiorari, petitioners state that the Opinion of the Court below "seriously jeopardizes continued DSI operations in the Northwest." This is simply not the case. The Government Accounting Office recommended that BPA

"decrease the quantities of power allocated to a DSI customer until the plant receives only as much power as would be needed by a modernized plant of the same capacity and technology." (emphasis added) *Impacts and Implications of the Pacific Northwest Power Bill*, Sept. 4, 1979 at 18-19.

This advice was based on two studies of the impact on the DSIs of increased rates, both of which contradict the scenario offered by petitioners.

"A consultants' study conducted for us in 1977 indicated that the salvage value of Pacific Northwest aluminum

²⁵ R. Beers and T. Lash, *Choosing An Electrical Energy Future For The Pacific Northwest: An Alternative Scenario*, reprinted in Bonneville Power Administration And Department of Interior, *The Role Of The Bonneville Power Administration In the Pacific Northwest Power Supply System, A Program Environmental Statement And Planning Project - Part I - The Regional Electric Power Supply System, Attachment A* (1977).

plants would have a major bearing on industry reactions to higher energy prices. The study showed that if electrical energy for Pacific Northwest aluminum companies were increased from the present 3 mills/kwh to 25 mills/kwh, the two least efficient plants in the region might cease operations. The other eight plants would likely be modernized, take on more workers, and produce more aluminum without increasing their consumption of energy." GAO, *Ibid.*, at pps. 17-18.

The second study of Northwest aluminum producers, conducted by the Department of Commerce at BPA's request, was completed in April 1979. It concluded that "... there is little likelihood of any Pacific Northwest plants being shut down as a result of increasing power costs under the proposed legislation;" and that "... modernization of [the four least efficient] plants would be profitable". GAO, *Ibid.* at pps. 17-18.

The ultimate result under the studies would be increased efficiency and modernization combined with decreased demand for electricity. Petitioners' claim that the interruptibility of nonfirm power will cause them to go out of business is not persuasive. BPA's attempted allocation of nonfirm power to the DSIs in disregard of the preference clause is objectionable on policy grounds as well as for the statutory and legal reasons stated elsewhere in this brief.

II. BPA'S INTERPRETATION OF THE STATUTE IS INCONSISTENT WITH THE PARTIES' STATED UNDERSTANDING AT THE TIME OF PASSAGE AND WAS NOT AMONG THE RANGE OF OPTIONS WHICH WERE CONSIDERED BY CONGRESS.

Complete protection for preference was an essential prerequisite to enactment of the Regional Act. This fact was recognized by BPA in a May 20, 1979 document outlining issues relevant to the pending legislation:

"[The] . . . facts have set the stage for an imminent and protracted legal battle within the Northwest over the meaning and application of the preference clause, the

formation of new preference utilities or other entities claiming preference status, and the fate of the DSIs . . .

This regional legal battle can be laid to rest if (1) the DSIs are able to trade in their existing low-cost power contracts for new contracts at higher rates; (2) the low cost power released by the DSIs can be made available to residential and small farm customers of regional IOU's; and (3) the preference rights of publicly-owned and cooperative utility systems can be preserved." H.REP. 96-976, Part I (Commerce), p. 36. (emphasis added).

Congress itself reached the same conclusion. As the Commerce Committee stated,

" . . . a variety of legislative approaches have been introduced and extensive hearings have been held. These hearings showed that acceptable legislation had to include: (1) strong conservation provisions; (2) provisions protecting the existing preference clause; . . . *Ibid.* at 27.

The role played by APPA and NRECA in assisting Congress with the drafting of the provisions in section 5 is consistent with the Committee's assessment. At early hearings on the legislation, these and other representatives of the publicly-owned utilities testified that the initial proposals did not adequately protect the statutory rights of preference which had always been mandated by the Bonneville Project Act. *Pacific Northwest Power Supply and Conservation Act: Hearings on S. 2080 and 3418 Before The Senate Committee on Energy and Natural Resources*, 95th Cong., 2d Sess., 1053 (Washington Public Utility Districts' Association), 1058, 1064 (Snohomish County Public Utility District), 1068-69 (American Public Power Association), 1079 (Public Power Council), 1103-04 (National Rural Electric Cooperative Association), 1112 (Eugene Water and Electric Board).

The Executive Director of APPA testified that the bills as drafted failed to preserve the preference principle. *Id.*, p. 1069. He recommended that Section 5 be amended to include a provision which would state that all BPA sales remain subject

to the preference provisions of the Bonneville Power Act.²⁶ Senator Jackson, one of the sponsors of the legislation stated,

"we will certainly have additional language that will make clear the continuity of the preference provision in the law." *Id.* at 1062.

Accordingly, Senator Jackson amended the legislation when it was reintroduced in the subsequent session by adding the provisions which ultimately became sections 5(a) and 10(c) of the Regional Act. S.REP. No. 95-272, 96th Cong., 1st Sess., 4, 14 (1979).

If petitioners disagreed with the assessments of the Congressional Committees, legislators and interested parties, they never revealed their objections. Nowhere in the legislative history can any suggestion be found that the traditional rights of preference with respect to nonfirm power would no longer be available under this legislation. In fact, the DSIs had learned to live with the reality that preference was to be preserved in every respect and were satisfied because the proposal guaranteed them long-term contracts, albeit at much higher prices. Counsel for the DSIs stated during hearings on the bill,

"Under this legislation, the price of a reasonable degree of planning certainty for the DSIs is the surrender of their existing low-cost power contracts in exchange for new contracts with dramatically higher rates and substantially lower power quality." Hearings on H.R. 3508 and 4159, before Subcommittee on Energy and Power of the House Committee on Interstate and Foreign Commerce, 311 (1979) (Testimony of Eric Redman).

This statement is entirely inconsistent with the present DSI claim of entitlement to priority allocations of nonfirm power.

²⁶ APPA testified that the legislation should be amended "... to state that all BPA sales are subject first to the preference provisions of the Bonneville Project Act, including the 5-year withdrawal feature of contracts with private power companies." *Id.* at 1069. (Testimony of Alex Radin).

Congress shared the view that the DSIs would benefit greatly from being able to enter into long-term contracts. The House Committee Report alludes repeatedly to the fact that BPA warned the DSIs that no renewal of their power sales contracts would be available after 1981 in the absence of federal legislation. H.REP. 96-972, Part II (Interior), pps. 30, 31. There is no indication that any legislator viewed the higher prices to be paid by DSIs as consideration for an increase in the volume or quality of power they would be entitled to purchase.

Congress enacted the Regional Act to provide certainty with respect to future allocations to all customers, including those eligible for preference. The Report of the Committee on Interior and Insular Affairs discusses administrative allocation strategies which were being developed by BPA for implementation in the absence of federal legislation. One such proposal would have limited future allocations to preference customers to a pro rata share after 1991. In commenting on the inadequacy of this approach, the Report states,

"Unfortunately, these shares will fall far short of meeting their requirements. . . . Before 1991, no BPA customers will be assured of getting its requirements met by BPA or certain in advance how much power it will be entitled to. Existing preference customers will, for the most part, be limited to supplies in accordance with their existing contracts. . . . New preference customers will divide up most of the power "freed up" by expiring DSI contracts, but the amount available to each will be impossible to determine in advance and will likely be insufficient to meet their needs." H.REP. 96-976, Part II (Interior), p. 31.

The Act was intended to alleviate uncertainties with respect to future preference allocations. Yet the industrial purchase contracts would accomplish the opposite by diminishing the predictability of allocations to public bodies and cooperatives. Further, the DSIs did not suffer from undue uncertainties resulting from the preference customers' priority to nonfirm power. In a Report prepared for the House Energy and Power

Subcommittee while it considered the proposed Regional Act, the General Accounting Office stated that,

"The DSIs rarely have to reduce production, even when their power supplies are interrupted by BPA. Before restricting deliveries to the DSIs, BPA can supply them an 'advance of energy' up to 2 million kwh." GAO, *Impacts and Implications of the Pacific Northwest Power Bill*, Sept. 4, 1979 at p. 16.

The Regional Act's express objective of promoting energy conservation²⁷ provides additional support for the thesis that the authors of this legislation never expected the bill to transfer preference rights to the DSIs. The House Commerce Committee referred to conservation as "the linchpin of this legislation," and stated that "the Committee expects that the DSIs will do their part to conserve energy." H.REP. NO. 96-976, Part I (Commerce), p. 63. This directive was based in part on responses which Representative John D. Dingell, Chairman of the Energy and Power Subcommittee, received from the GAO with regard to potential savings. GAO stated,

"Most DSI plants were constructed in the 1940's and 1950's. The potential for electricity conservation in some plants with older production facilities may be significant. There are large differences, for example, in the relative electrical efficiency of the 10 Northwest aluminum smelters. The most efficient smelter operates at just over 6 kwh per pound of production, while the least efficient

²⁷ Section 2 states in relevant part:

"The purposes of this chapter . . . are . . . conservation and efficiency in the use of electric power." 16 U.S.C. § 839(1)(A).

Section 4 states in relevant part:

"The purposes of this section are . . . to provide for . . . a regional conservation plan." 16 U.S.C. § 839b(a)(1).

smelters consume one-third more electricity—operating at over 8 kwh per pound of production. GAO, *Impacts and Implications of the Pacific Northwest Power Bill*, Sept. 4, 1979, p. 14.

Accordingly, GAO recommended that the Chairman amend the legislation to

“—Authorize BPA, when necessary, to gradually decrease the quantities of power allocated to a DSI customer until the plant receives only as much power as would be needed by a modernized plant of the same capacity and technology. This action would be taken by BPA only if voluntary conservation efforts by the DSI customer proved insufficient to meet commercial standards for production efficiency. *Ibid.* at 18 and 19.

GAO made it clear that significant energy savings can be accomplished by means of modernizing plants operated by the DSIs. The Committee did not accept the GAO recommendations designed to reduce the DSIs' entitlements in the precise manner suggested. However, the restriction on allocations to DSIs embodied in § 5(d)(1)(B)²⁸ was enacted with the GAO recommendations in mind, as is evidenced by the House Committee's expectation “that the DSIs will do their part to conserve energy.” The BPA and DSI position that the Regional Act was intended to entitle them to a newfound priority with respect to nonfirm energy is clearly inconsistent with the expectations of Congress as well as the affected parties.

III. THE 9TH CIRCUIT CORRECTLY CONCLUDED THAT BPA'S ATTEMPT TO DIMINISH PREFERENCE WAS UNLAWFUL.

A. The BPA/DSI Contracts Are Inconsistent With The Plain Meaning Of The Regional Act.

After passage of the Regional Act, the BPA Administrator entered into new industrial purchase contracts which provide

²⁸ § 5(d)(1)(B) limits DSI entitlements under the Act to “an amount of power equivalent to that to which such customer is entitled under its contract dated January or April 1975.” 16 U.S.C. § 839c(d)(1)(B).

for the sale of nonfirm power to direct service industrial customers ("DSIs") while limiting the purchase of that electricity by preference entities. These contracts repudiate the preference and priority which BPA has historically accorded to public bodies²⁹ pursuant to the Bonneville Project Act of 1937, 16 U.S.C. § 832c.

Petitioners have cited statutory provisions and accompanying legislative materials³⁰ which they claim support the view that Congress had in mind a specific allocation scheme which overrides conflicting priority rights previously enjoyed by preference customers. The Court below found that the plain meaning of the Regional Act preserves all preference rights in their entirety.³¹ Therefore, resort to extrinsic aids such as legislative history is unnecessary.³² The Act clearly precludes the interpretation advanced by Petitioners, and the case can be disposed of solely by reference to the language of the Act itself.

Did Congress, in enacting the Pacific Northwest Electric Power Planning and Conservation Act, authorize the Bonneville Power Administration to allocate secondary "nonfirm" hydropower initially to its direct service industrial customers, where that power was previously available to municipalities and cooperatives on a priority basis?

Prior to the Act's passage, there was never any question that public bodies' preference entitlement applied to both firm and secondary (nonfirm) power. A 1956 legal opinion written by BPA's staff attorneys stated,

"The Bonneville Project Act requires that the Administrator shall at all times in disposing of electric energy

²⁹ See pps. 10-11, *supra*.

³⁰ See Petitioners Brief at 23-24.

³¹ 696 F.2d 706, at 713.

³² 2A Sutherland Statutory Construction, 4th Ed. (Sands) § 48.01, p. 82. Cf. *United States v. Donruss Co.*, 393 U.S. 297, 21 L.Ed. 2d 516, 89 S.Ct. 501 (1969), *Wiggins Bros., Inc. v. DOE*, 667 F.2d 77 (Emerg. Ct. App. 1981).

generated at projects subject to the Act, give preference and priority to public bodies and cooperatives. Section 4(a). This applies to all electric energy generated at the projects, *both firm and secondary*. Accordingly, the same legal requirements will govern the sale of by-product secondary as now govern sales of firm power. If public bodies or cooperatives make application to purchase the energy under the new pricing policy inaugurated, their needs will have to be met first." Opinion of the Office of the Regional Solicitor, Portland, March 5, 1956. (emphasis added).

Petitioners contend that the Regional Act altered those historical entitlements by allowing BPA to enter into contracts with DSIs, the provisions of which would effectively deny to preference customers their priority with respect to nonfirm power.

The Act could not be clearer with respect to the status of the preference rights historically accorded to "public bodies" pursuant to the Bonneville Project Act and other Federal statutes. Section 5(a) states,

"All power sales under this Act shall be subject at all times to the preference and priority provisions of the Bonneville Project Act of 1937. . . ."

Similarly, Section 10(c) provides,

"Nothing in this act shall alter, diminish, abridge, or otherwise affect the provisions of other Federal laws by which public bodies and cooperatives are entitled to preference and priority in the sale of federally generated electric power."

The two provisions quoted above are unequivocal. Any interpretation of the Regional Power Act which results in the diminution of respondent's preference rights is clearly prohibited.

**B. Petitioners Rely On A Selected Portion Of Section 5
Lifted Out Of The Statutory Context; Taken In Context,
The Statute Does Not Support Their Position.**

Examined in the context of section 5 in its entirety, the provision relied upon by petitioners fails to support their position. The specific language which petitioners cite for the proposition that Congress envisioned specific allocations of constant nonfirm power to the DSIs is stated in the second sentence of § 5(d)(1)(A):

"The Administrator is authorized to sell in accordance with this subsection electric power to existing direct service industrial customers. Such sales shall provide a portion of the Administrator's reserves for firm power loads within the region." 16 U.S.C. § 839(c)(d)(1)(A).

Their argument is that by authorizing BPA to use DSI allocations as reserves for firm power loads, Congress impliedly forbade the use of such power for nonfirm purposes.

Petitioners assume that Section 5(d)(1)(A) addresses the question of how to treat the nonfirm power which had always been subject to the priority rights of preference customers. The Court below disagreed:

"Section 5(d)(1)(A) specifies only that the reserve shall be used for firm power loads; it says nothing about the provision of nonfirm energy."³¹

Petitioners' reliance on the definition of "reserves" is misplaced. Section 3(17) of the Act defines "reserves" as "the power needed to avert . . . shortages for the benefit of firm power customers . . ." 16 U.S.C. § 839(a)(17). This definition, by its very terms, is inapplicable to the initial allocation of *nonfirm* power to preference customers. Even if petitioners' strained reading of the implied meaning of section 5(d)(1)(A) were accepted, retention of the preference entitlement to nonfirm power would be consistent with that interpretation.

³¹ 686 F.2d at 813.

The petitioners' view of section 5(d)(1)(A) is inconsistent with section 5 read as a whole. The provision relied upon cannot be read in a vacuum. When section 5(d)(1)(A) is analyzed in conjunction with related subsections, it is clear that the provision relied upon by petitioners does not alter the right of preference customers to initial allocations of nonfirm power from BPA.

Subsection 5(g)(7) of the Regional Power Act states,

"The Administrator shall be deemed to have sufficient resources for the purpose of entering into the initial contracts specified in paragraph (1)(A)-(D)." 16 U.S.C. § 839(c).

Paragraph (1)(D) directs the Administrator to enter into negotiations for the purpose of executing long-term contracts with direct service industrial customers under subsection (d)(1). Hence the Administrator's authority to negotiate long-term industrial purchase contracts with the DSIs is governed by the provisions of subparagraphs (A) and (B) of subsection (d)(1).

Petitioners' argument based on section 5(d)(1)(A) is incompatible with BPA's power marketing scheme. Congress was saying nothing about how nonfirm power produced by BPA was to be allocated when it stated that a portion of the DSIs' purchases were to be used to meet the firm power loads which are derived from the needs of BPA's customers. Since some nonfirm energy is frequently used to support the firm power loads served by preference customers,³⁴ the provision limiting the use of DSI power to serve firm loads only has no effect whatsoever on the priority rights of preference customers to receive nonfirm power. Petitioners seek to advance an argument which is conceptually unsound.

³⁴ See, e.g., BPA Contract Official Records, Vol. XXX, p. 008409 (purchases by City of Seattle, and City of Tacoma of nonfirm BPA power to support their capabilities).

Subsection (d)(1)(B) places a key restriction on the manner in which the Administrator is to allocate electricity to the DSIs:

"... the Administrator shall offer in accordance with subsection (g) of this section to each existing direct service industrial customer an initial long term contract that provides each customer *an amount of power equivalent to that to which such customer is entitled under its contract dated January or April 1975* providing for the sale of "industrial firm power." (emphasis added) 16 U.S.C. § 839(c).

The language of subparagraph B, quoted above, places a clear limitation on the amount of power which the Administrator is authorized to allocate to DSIs pursuant to subsections g(1)(D) and g(7). The statute plainly states that the industrial purchase contracts are to provide for the allocation of the same amount of power to which the DSIs were entitled pursuant to the contracts which were negotiated in 1975, prior to the passage of the Act. This limitation sharply contradicts the implied meaning which petitioners seek to derive from the language of 5(d)(1)(A). Petitioners argue that the omission from the provision of nonfirm power with respect to reserves evidences an intention to augment the DSIs' entitlements by giving them newfound rights to purchase nonfirm power. Yet section 5(d)(1)(B) plainly states that the new contracts shall not grant to the DSIs any power beyond that to which they were previously entitled. The Administrator violated § 5(d)(1)(B) by entering into new industrial purchase contracts which increase the DSIs' power entitlement by giving them priority to non-firm power.

BPA argues that the increased entitlement to DSIs embodied in the reversal of preference entitlements in the new industrial purchase contracts is consistent with § 5(d)(1)(B) because that provision relates only to the amount of power to be allocated pursuant to contract demand equivalencies rather than to the power entitlements which were stipulated under the old contracts. This interpretation is flatly contradicted by the terms of § 5(d)(1)(B). The provision directs the Adminis-

trator to allocate to DSIs an amount of power equivalent to such customers' *entitlement* pursuant to the prior contracts. It is unquestioned that the DSIs' prior entitlements were specifically limited by the priority which preference customers enjoyed with respect to nonfirm power. The new contracts violate the specific mandate of Congress by reversing that limitation and endowing the DSIs with new entitlements which were previously unavailable.

BPA misconstrued their section 5 authority in attempting to deprive the preference customers of their right of priority with respect to nonfirm power. The new allocation methodology violates the plain meaning of sections 5(a) and 10(c) of the Act, which prohibit any abridgment of the rights of public bodies under the preference clauses found in the Bonneville Project Act and related statutes. The methodology is based on an unreasonable and conceptually unsound interpretation of section 5(d)(1)(A), a provision which says *nothing* about initial allocation of nonfirm power. That language addresses the use of power which is to be allocated to the DSIs, but which may later be treated as reserves for the purpose of serving the firm loads of customers suffering deficiencies. This is an entirely different matter from initially allocating nonfirm power to priority customers who are entitled by law to receive the power first. On the basis of the plain meaning of the statute, the Court below was correct in concluding that the new industrial purchase contracts negotiated by BPA and the DSIs are unlawful. The statute and common sense support respondent's contention that the nonfirm power in question must be allocated initially to the preference customers.

The Regional Act's function in regulating power allocation by the Administrator and his subordinates provides further support for the view that the language of sections 5(a) and 10(c) cannot be disregarded by BPA. It is well settled that statutory directives which govern the actions of public officials are

mandatory. This rule was established by this Court as early as 1871:

"There are, undoubtedly, many statutory requisitions intended for the guide of officers in the conduct of business developed upon them which do not limit their power or render its exercise in disregard of the requisitions ineffectual . . . But when the requisitions prescribed are intended for the protection of the citizen, and to prevent a sacrifice of his property and by a disregard of his rights might be and generally would be injuriously affected, they are not directory, but mandatory. They must be followed or the acts done will be invalid. The power of the officer in all such cases is limited by the manner and conditions prescribed for its exercise." *French v. Edwards*, 80 U.S. 506, 511. See also, 2A Sutherland, § 57.14 at 435.

As discussed *supra*, the preference provisions which are contravened by the BPA's decision to abridge respondents' rights to nonfirm power were enacted in order to preserve for the public the benefits of the less expensive hydroelectric power produced at federal installations. The limitations on the discretionary authority set forth in sections 5(a) and 10(c) of the Regional Power Act fall squarely within the rule stated in the language quoted above. The Administrator lacks the discretion to usurp the rights of the preference customers. This attempt to do so is unlawful and was properly struck down by the Court below.⁴⁵

⁴⁵ The interpretation of section 5(d)(1)(A) advanced by BPA is at variance with the rules of construction relevant to determinations by administrative agencies. Administrative constructions which, like the BPA interpretation at issue here, are arrived at in an uncontested non-adversary proceeding are not entitled to great weight. *SEC v. Sterling Precision Corp.*, 393 F.2d 214 (2nd Cir. 1968); *Williams v. Dandridge*, 297 F.Supp. 450 (D.Md. 1968). See also, 2A Sutherland, Statutory Construction, § 49.05 at 239 (1973). Further, arguments of counsel for an administrative agency do not have the persuasive force of an official agency interpretation. *Investment Co. Institute v. Camp*, 401 U.S. 617 (1971). See also, Sutherland, *Ibid*.

C. Canons Of Statutory Construction Require Rejection Of The DSI's Statutory Interpretation.

A court should resort to the use of extrinsic aids in determining the meaning of a statute only where the language itself is ambiguous and unclear.⁹⁶ The language of sections 5(a) and 10(c) is clear. See *supra* at pps. 20. Nothing in the Act is to alter or in any way diminish the preference provisions which apply to the BPA allocations by virtue of other federal laws. The DSIs, by arguing that the language and legislative history of section 5(d)(1)(A) impliedly removed the preference rights which have long been applicable to nonfirm power, attempt to circumvent the clear language of the statute. They seek to do so by invoking provisions of the Act which are unrelated to the matter of allocation of nonfirm power. In light of the unambiguous language of the Act dealing with preference, respondents' arguments based on extrinsic aids are inapplicable.

Rejection of the DSI position is also required by the mandatory nature of the preference saving provisions. Section 5(a) states that "All power sales under this Act *shall* be subject at all times to the preference and priority provisions of the Bonneville Power Act . . ." (emphasis added). Similarly, section 10(c) mandates that "Nothing in this Act shall alter, diminish, abridge or otherwise affect the provisions of other Federal laws by which public bodies and cooperatives are entitled to preference." The use of mandatory language such as "shall" is the single most important textual consideration bearing on whether a statute is mandatory or directive. 2A Sutherland, *Stat Constr.*, § 57.03 at 415 (1973). Sections 5(a) and 10(c) are clearly mandatory terms and evidence a Congressional intent to dictate rather than merely guide. In fact, Congressman Swift, who introduced the initial legislation in the House of Representatives, stated on the House floor that with respect

⁹⁶ 2A Sutherland, *Statutory Construction*, § 48.01 at p. 182 (1973). See, e.g., *Ex parte Collett*, 337 U.S. 55 (1949).

to any "concern about the difference between mandatory and discretionary provisions, . . . the simplest point to make is where the bill uses the word 'shall,' it means 'shall,' not 'may.' " 126 CONG. REC. E5092, December 1, 1980.

Petitioner's argument that the omission of nonfirm power from the language of § 5(d)(1)(A) of the Regional Power Act yields a DSI entitlement to that power constitutes a flawed attempt to derive negative implications from the statutory language. In reference to the suggested approach that where a statute directs an act to be done in a particular form or manner, it excludes every other manner, Sutherland has stated that statutory interpretation by means of negative implication is a rule which is "not one of substance, but . . . merely a guide to legislative intention." 1A Sutherland, Statutory Construction, § 24.04 at 296 (1973). To the extent that negative implication is useful, the Regional Act militates *against* any DSI entitlement to uninterrupted nonfirm power. The negative implications of sections 5(a) and 10(c), which prohibit any abridgment of respondent's preference rights, are that those rights must be preserved and protected, and that anything in the Act that is inconsistent with those rights must yield.

IV. THE LEGISLATIVE HISTORY OF THE REGIONAL POWER ACT CLEARLY DEMONSTRATES THAT CONGRESS NEVER INTENDED TO RESTRICT PREFERENCE WITH RESPECT TO NONFIRM POWER.

Assuming, *arguendo*, that the language of section 5(d)(1)(A) cited by petitioners can be said to create the requisite degree of ambiguity to justify resort to extrinsic aids, the legislative history of the Regional Act clearly shows that the outcome sought by the DSIs was specifically rejected by the legislators and interested parties who participated in the creation of the statute. The Committee Reports, floor debates and political backdrop to the Act indicate that respondent's rights to priority in the allocation of nonfirm power were intended to be completely preserved and protected. In fact, the passage of the Act depended on the general understanding that all preference rights were to be retained.

The House Interstate and Foreign Commerce Committee makes unequivocal statements regarding the purposes and operation of the Act. H.REP. No. 96-976, Part I, 96th Cong., 2d Sess. (1980) (Commerce), p. 27, 59. The Report goes to great lengths to emphasize the bill's intention of retaining preference rights by way of section 5(a):

"Concerns have been expressed that S. 885 might be construed to change the meaning or application of preference in the Northwest, and by precedent, nationally. However, the intention of this Committee is clear. The Committee does not want to undo nearly 80 years of history or establish any precedent. Specific provisions incorporated in the Committee amendment are designed to protect the entitlement of both existing and new preference customers to the full Federal base system. These provisions seek to protect preference as to both supply and price."

Later in its Report, the Committee on Interior states,

"It is not a purpose of this legislation to interfere in any way with, or modify, the statutory rights of preference customers either within or without the region;"
H.R. REP. No. 96-976, Part II, (Interior) 96th Cong., 2d Sess. (1980), p. 26.

Similarly, the Committee stated in its description of the meaning of section 5(a) that:

"Section 5(a) makes clear that all power sales under this bill are subject at all times to the Bonneville Project Act, particularly sections 4 and 5 of the Act. This provision therefore retains the preference and priority accorded public bodies and cooperatives in BPA power sales. Related preference protecting provisions include sections 5(b), 7(b) and 10(c)." *Ibid.* at 46.

The Congressional Committees' view that the Act preserves all priorities previously enjoyed by preference customers is corroborated by numerous statements made by the legislators themselves. Representative Foley of Washington addressed the issue specifically when he stated that section 5(g)(7), which provides that BPA shall be deemed to have sufficient power to

enter into the 20-year DSI contracts, "does not 'guarantee' power delivery in the day-to-day operation . . ." 126 CONG. REC. H. 10678 (daily ed. Nov. 17, 1980) (remarks of Rep. Foley). The floor debates are riddled with expressions of the view that the Act was intended to preserve preference rights in all respects.⁴⁷ In contrast, the legislative history contains no indication whatsoever that the Act would alter any preference rights.

Resort to the legislative history is unnecessary in light of the Act's plain meaning. Nonetheless, the background to the enactment of Regional Act clearly supports the meaning which, as described elsewhere in this brief⁴⁸ is apparent on the face of this statute. The Act prohibits the abridgment of preference rights which BPA and the DSIs seek to achieve by means of contract negotiation. The Court below was correct in so holding, and must be affirmed.

⁴⁷ See, e.g., 126 CONG. REC. S 14693 (daily ed. Nov. 19, 1980) (remarks of Sen. Hatfield); 126 CONG. REC. H 10674 (daily ed. Nov. 17, 1980) (remarks of Rep. Kazen); 126 CONG. REC. H 10677 (daily ed. Nov. 27, 1980) (remarks of Rep. Brown); 126 CONG. REC. H 10679 (daily ed. Nov. 17, 1980) (remarks of Rep. Swift); 126 CONG. REC. H 9850, 9851 (daily ed. Sept. 29, 1980) (remarks of Rep. Swift); 126 CONG. REC. H 9855 (daily ed. Sept. 29, 1980) (remarks of Rep. Symms); 126 CONG. REC. H 9862 (daily ed. Sept. 29, 1980) (remarks of Rep. Duncan).

⁴⁸ See pps. 18-20, *supra*.

CONCLUSION

For these reasons, the Opinion below of the U.S. Court of Appeals for the Ninth Circuit was correct and should be affirmed. The Regional Act clearly forbids BPA from diminishing respondents' preference rights. The plain meaning of the statute is strongly supported by numerous statements in the legislative history reflecting the intent of Congress to continue all preference priorities. Finally, strong policy considerations corroborate the Congressional determination that the rights of preference historically enjoyed by publicly owned utilities must be preserved in their entirety.

Dated:

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ALEXANDER L. STEVAS,
CLERK

No. 82-1071

IN THE
Supreme Court of the United States

October Term, 1983

ALUMINUM COMPANY OF AMERICA, et al.,
Petitioners,

v.

CENTRAL LINCOLN PEOPLES'
UTILITY DISTRICT, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

**BRIEF OF AMICI CURIAE
INTERNATIONAL PAPER CO.
AND LONGVIEW FIBRE CO.**
IN SUPPORT OF AFFIRMANCE

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**BRIEF OF AMICI CURIAE
INTERNATIONAL PAPER CO.
AND LONGVIEW FIBRE CO.**

Amici curiae, International Paper Company and Longview Fibre Company, submit this brief in support of the position of Respondents Central Lincoln Peoples' Utility District, et al. and of the decision of the Ninth Circuit Court of Appeals in *Central Lincoln Peoples' Utility District v. Johnson*, 686 F.2d 708 (9th Cir. 1982).

INTEREST OF AMICI

This case involves a dispute over the priority for allocation of nonfirm or secondary energy between a limited number of industries directly serviced by the Bonneville Power Administration (the direct service industries, or DSIs, most

of which are aluminum companies)¹ and preference customers of BPA (consisting of "public bodies" and cooperatives)² under the Pacific Northwest Electric Power Planning and Conservation Act, 16 U.S.C. §§ 839-839h (Supp. 1981) (the Regional Act). The court of appeals held that the preference customers' priority access to energy generated by the Bonneville Power Administration (hereinafter referred to as BPA) included a priority over the DSIs to this nonfirm energy.

BPA's preference customers utilize BPA nonfirm energy in several ways for the benefit of their industrial and other customers. For example, preference customers of BPA with their own generating facilities use nonfirm energy as a backup for energy which they generate from their own facilities when those facilities experience emergencies, undergo repair or are otherwise not able to supply energy to their customers. These preference customers also can and do contract with BPA for purchase of interruptible nonfirm energy for resale to their industrial customers to supply a portion of those customers' nonfirm energy needs.

International Paper Company and Longview Fibre Co., amici curiae in this case, are two of the numerous substantial Pacific Northwest industrial purchasers of electricity from BPA's preference customers. Both companies are energy

1. As of 1980, there were fifteen direct service industry customers for BPA power. Of these, the primary producers of aluminum metal accounted for approximately 90% of the total BPA direct service industrial load. BPA, *Final Environmental Impact Statement, the Role of the Bonneville Power Administration in the Pacific Northwest Power Supply System* (DOE/EIS-0066) (Dec. 1980) at IV-80, in Joint App. at 30.

2. The term "preference customers" as used in this controversy refers to public bodies and cooperatives entitled to preference and priority to electrical energy generated at the Bonneville Project pursuant to Section 4 of the Bonneville Project Act, 16 U.S.C. § 832c (1976). The term "public bodies" is further defined in that Act to include "States, public power districts, counties and municipalities, including agencies or subdivisions of any thereof" Bonneville Project Act § 3, 16 U.S.C. § 832b (1976). Public utility districts in Washington and Peoples' utility districts in Oregon (PUDs) are included within this term. House Interior Report, H.R. Rep. No. 967 (II), 96th Cong., 2d Sess. 27, 1980 U.S. Code Cong. & Ad. News 6,024-25, in Pet. App. at E-69.

intensive; both have experienced soaring electrical bills over the past few years, and their electrical costs have comprised an increasing percentage of their manufacturing costs. In addition, Longview Fibre Co. purchases nonfirm energy from the Cowlitz County Public Utility District which Cowlitz receives from BPA for Longview under an arrangement which will be impaired if the Ninth Circuit decision is overturned. The economic health of these companies' operations in the Pacific Northwest is directly affected by the outcome of this lawsuit.

Longview Fibre produces pulp and paper at its Longview, Washington, plant served by the Cowlitz County PUD. Longview operates seven days per week, 24 hours per day. It has 15 plants in other locations in the United States which depend on the Longview mill for raw material for manufacturing boxes and bags. It employs about 3,000 workers nationwide, nearly 2,000 of them at its Longview plant. In addition, 350 to 400 workers employed by other entities depend directly upon Longview Fibre for jobs transporting raw materials to its plant, and the company has indirectly created numerous other jobs in the Pacific Northwest for its suppliers and for the transportation of finished product to its markets.³

Longview Fibre purchases all of its electricity from the Cowlitz County PUD and uses most of it for pumps, pulp refining, paper machine drives, fans and conveying equipment. Through 1982, it purchased only "firm load" energy from Cowlitz County PUD, for which it was charged the firm load cost of energy from BPA to the PUD plus applicable surcharges and distribution costs. In the four years from 1979 to 1982, its electrical usage dropped from 870,000 megawatt hours to 660,000 megawatt hours, but its electrical costs increased from \$3,335,000.00 to \$10,250,000.00. This more than three-fold increase in electrical costs resulted from

3. Bonneville Power Administration 1983 Wholesale Power and Transmission Rate Adjustment Hearings, May 23, 1983 (identified by BPA at those hearings as Exhibit WP83-E-PA-3), appended as Appendix A to this brief (Testimony of Richard Wollenberg, President and Chief Executive Officer of Longview Fibre Company).

a quadrupling of the cost per kilowatt hour of BPA electricity which Cowlitz passed on to Longview.⁴

Recently, BPA, because of an abundance of electrical energy, entered into a contract for sale of interruptible nonfirm energy to Cowlitz County PUD at the lower nonfirm energy rate for resale to Longview Fibre for use in steam generation. The energy resource for this steam generation was previously wood waste. BPA proposed in a Notice of Proposed Policy appearing in 48 Fed. Reg. 33,518-25 on July 22, 1983 that this and similar contracts for nonfirm energy to be sold to BPA's preference customers for resale to their industrial customers be extended through June 30, 1987.

Access to this lower cost nonfirm energy is extremely important to Longview Fibre, and it will be directly affected by the outcome of this lawsuit. BPA clearly announced in its Notice of Proposed Policy that if demand for nonfirm energy exceeds supply, it will allocate the available nonfirm energy strictly "in accordance with Pub. L. 88-552 [16 U.S.C. §§ 837-837h (1976), Pacific Northwest Consumer Power Preference Act] and the Central Lincoln I decision [the case on review here] until such time as that case is finally adjudicated by the U.S. Supreme Court, and on a prorata basis within a customer class." 48 Fed. Reg. at 33,522. Accordingly, BPA will no longer honor the clause granting its preference customers priority over DSIs for nonfirm energy if the Ninth Circuit decision in this case is overturned. Longview Fibre thus has a direct economic interest at stake in this lawsuit.

International Paper Company operates a paper mill and a wood products mill in Gardiner, Oregon, served by respondent Central Lincoln Peoples' Utility District. The paper mill has employed an average of approximately 360 workers over the period 1979 through 1982 and used an average of about 175,000 megawatt hours per year of electricity during this period, all of it firm energy supplied by the Central Lincoln PUD. It has watched its electrical

4. *Id.*

costs increase from 2.19% of total manufacturing costs to 4.33% during that time. Its wood products mill has employed an average of 285 workers over the same period and seen its electricity use decline from 24,000 kilowatt hours in 1979 to approximately 11,000 kilowatt hours in 1981 and 1982; yet its annual electrical costs have climbed from \$161,000.00 in 1979 to \$258,000.00 in 1982. These costs now account for a full 8% of its total manufacturing costs. A major industrial customer of Central Lincoln PUD, International Paper has a stake in assuring that Central Lincoln and other preference customers maintain their statutory priority access both to firm and to nonfirm energy. Central Lincoln and International Paper have been evaluating the feasibility of constructing a co-generation project at International Paper's plant. Availability of nonfirm energy would be an important component for such a co-generation project as backup energy for breakdowns and scheduled maintenance. Nonfirm energy would not be used for displacement because the co-generation project would always operate to produce process steam for International Paper's operations.

There are approximately 116 preference customers within the region served by the BPA.⁵ Many of these preference customers supply energy to industrial customers in their territory. These relationships developed through the long history of public power in the Northwest under the Bonneville Project Act of 1937 [16 U.S.C. §§ 832-8321 (1976)], and these industrial customers have invested substantial sums in their enterprises in the expectation that their energy needs could be met by the PUDs and other public bodies in the region through priority access to lower cost BPA energy. The viability of these industrial customers and the livelihood of their employees depend upon the continued availability of reasonably priced electricity furnished to these preference customers.

5. The 116 preference customers served by BPA include 36 municipal utilities, 54 rural electric cooperatives and 26 PUDs (Public Utility Districts in Washington and Peoples' Utility Districts in Oregon). House Interior Report, *supra* note 2 at 27, 1980 U.S. Code Cong. & Ad. News at 6,025, in Pet. App. at E-69.

SUMMARY OF ARGUMENT

Existing law prior to enactment of the Regional Act gave preference and priority to public bodies and cooperatives for electrical energy generated by BPA. BPA faithfully applied this preference both to firm and nonfirm energy. The Regional Act explicitly preserved the pre-existing preference and priority. Congress thus reaffirmed both the preference and priority and its application. The legislative history of the Regional Act also supports Congress' intention to preserve the pre-existing preference and priority as it then existed.

In disregard of this statutory mandate, BPA, abetted by petitioners, seeks radically to alter application of the preference as it applies to nonfirm energy. Their position both lacks foundation in law and would create curious anomalies with preference provisions in other statutes. Moreover, as a policy matter, it is unreasonable to grant priority for nonfirm energy to the DSIs. They are the one group of users which can best withstand an intermittent interruption in power service. If their enormous demand for nonfirm power nevertheless were placed ahead of the nonfirm needs of BPA's preference customers, in time of shortage, the huge DSI demands would be met, while relatively modest nonfirm energy needs of the preference customers would very likely not be met at all.

The Ninth Circuit Court of Appeals' decision was both appropriate and proper. It should be affirmed.

ARGUMENTS AND AUTHORITIES

The Ninth Circuit Court of Appeals Correctly Decided This Controversy

The analysis of this case must start with recognition of the status of the preference granted to public bodies and cooperatives as it existed before enactment of the Regional Act. There is no dispute that then-existing law gave explicit "preference and priority to public bodies and cooperatives" when BPA disposed of "electrical energy generated at the project." Bonneville Power Project Act § 4(a), 16 U.S.C. § 832c(a)

(1976). This explicit statutory preference applied both to firm and to nonfirm energy. Moreover, the BPA, consistent with this statutory requirement, faithfully applied this preference in allocating both firm and nonfirm energy. The Ninth Circuit noted that BPA interpreted that preference clause to apply both to firm energy and to nonfirm energy and described BPA's allocation scheme as follows:

It is undisputed in this case that BPA previously interpreted the preference provision to apply to nonfirm power as well as firm power. Thus, prior to offering the contracts now at issue, BPA allocated nonfirm power according to the preference after it had first allocated firm power according to the preference.

Central Lincoln People's Utility District, 686 F.2d at 711.

BPA, in its own Environmental Impact Statement published in December, 1980, described its own pre-existing policy giving the public bodies and cooperatives priority over DSIs for nonfirm or secondary energy as follows:

The current secondary sales policy calls for the following priorities in the allocation of any secondary energy: (1) All firm energy loads will be served if any are not being met. This includes the bottom three quartiles of the direct-service industrial (DSI) load; (2) new reservoirs will be filled or depleted reservoirs restored; (3) *public agencies' secondary power demands will be met, allowing them to refill their own reservoirs or displace thermal generation currently being used to serve their own loads*; (4) *when not all secondary demands can be met, the remaining energy is split approximately equally between private utilities and the direct service industries of the region*; (5) after the top quartile of the DSI loads has been met, private utilities in the region can then purchase secondary energy to displace any of their remaining thermal generation which they have declared necessary for meeting firm loads under the Pacific Northwest Coordination Agreement; and (6) after all applicable regional loads have been met, and water cannot be considered for later use in the region, surplus power is made available for sale to the Pacific Southwest over the California Intertie.

BPA, *Final Environmental Impact Statement on the Role of the Bonneville Power Administration in Pacific Northwest Power System, Thermal Power Program* (DPE/EIS-0066 (Dec. 1960) at IV-71 in Joint App. at 29 (emphasis supplied). This policy is of long duration. *Central Lincoln People's Utility District*, 686 F2d at 711.

When the Regional Act was adopted, Congress explicitly preserved the pre-existing preference and priority of these same public bodies and cooperatives. Not once, but twice, did it make this point.

First, it stated in Section 5(a) [16 U.S.C. § 839c(a) (Supp. 1981):

All power sales under this chapter shall be subject at all times to the preference and priority provisions of the Bonneville Project Act of 1937 and, in particular, Sections 4 and 5 thereof. Such sales shall be at rates established pursuant to Section 839e of this Title.

Sections 4 and 5 of the Bonneville Project Act clearly and explicitly set out the scope of the preference given to these public bodies and cooperatives.⁶

6. Sections 4 and 5 of the Bonneville Project Act [16 U.S.C. § 832c and d (1976)] read in pertinent part as follows:

§832c. *Distribution of electricity; preference to public bodies and cooperatives*

(a) *General Provisions*

In order to insure that the facilities for the generation of electric energy at the Bonneville project shall be operated for the benefit of the general public, and particularly of domestic and rural consumers, the administrator shall at all times, in disposing of electric energy generated at said project, give preference and priority to public bodies and cooperatives.

(b) *Prior to January 1, 1942; subsequent thereto*

To preserve and protect the preferential rights and priorities of public bodies and cooperatives as provided in subsection (a) of this section and to effectuate the intent and purpose of this chapter that at all times up to January 1, 1942, there shall be available for sale to public bodies and cooperatives not less than 50 per centum of the electric energy produced at the Bonneville project, it shall be the duty of the administrator in making

Second, it stated in Section 10(c) of the Regional Act [16 U.S.C. § 839g(c) (Supp. 1981)]:

Nothing in this chapter shall alter, diminish, abridge, or otherwise affect the provisions of other Federal laws by which public bodies and cooperatives are entitled to preference and priority in the sale of federally generated electric power.

Congress' explicit preservation of the pre-existing preference and priority necessarily reaffirmed that preference and priority as it theretofore existed. The House Commerce Committee so indicated its intention in its report, where it stated:

Preference means the statutory priority to purchase Federally-generated electricity, which has generally been provided to public bodies and rural electric cooperatives in over 32 Federal power marketing laws. These preference provisions date back to 1902 and were enacted to insure that Federal hydro-electric generating facilities would be operated for the benefit of the general public.

...

Concerns have been expressed that S. 885 might be construed to change the meaning or application of preference in the Northwest, and by precedent, nationally. However, the intention of this Committee is

Footnote 6 (con't)

contracts for the sale of such energy to so arrange such contracts as to make such 50 per centum of such energy available to said public bodies and cooperatives until January 1, 1942: *Provided*, that the electric energy so preserved for but not actually purchased by and delivered to such public bodies and cooperatives prior to January 1, 1942, may be disposed of temporarily so long as such temporary disposition will not interfere with the purchase by and delivery to such public bodies and cooperatives at any time prior to January 1, 1942: *Provided further*, that nothing herein contained shall be construed to limit or impair the preferential and priority rights of such public bodies or cooperatives after January 1, 1942; and in the event that after such date there shall be conflicting or competing applications for an allocation of electric energy between any public body or cooperative on the one hand and a private agency of any character on the other, the application of such public body or cooperative shall be granted.

clear. The Committee does not want to undo nearly 80 years of history or establish any precedent.

House Commerce Report, H.R. Rep. No. 976 (I), 96 Cong., 2d Sess. 33-34, 1980 *U.S. Code Cong. & Ad. News* 5,999-6,000, in *Pet. App.* at D-76.

Footnote 6 (con't)

§832d. *Contracts for sale of electricity*

(a) *Authorization of administrator; contents of contracts*

Subject to the provisions of this chapter and to such rate schedules as the Federal Power Commission may approve, as provided in this chapter, the administrator shall negotiate and enter into contracts for the sale at wholesale of electric energy, either for resale or direct consumption, to public bodies and cooperatives and to private agencies and persons and for the disposition of electric energy to Federal agencies. Contracts for the sale of electric energy to any private person or agency other than a privately owned public utility engaged in selling electric energy to the general public, shall contain a provision forbidding such private purchaser to resell any of such electric energy so purchased to any private utility or agency engaged in the sale of electric energy to the general public, and requiring the immediate cancelling of such contract of sale in the event of violation of such provision. Contracts entered into under this subsection shall be binding in accordance with the terms thereof and shall be effective for such period or periods, including renewals or extensions, as may be provided therein, not exceeding in the aggregate twenty years from the respective dates of the making of such contracts. Contracts entered into under this subsection shall contain (1) such provisions as the administrator and purchaser agree upon for the equitable adjustment of rates at appropriate intervals, not less frequently than once in every five years, and (2) in the case of a contract with any purchaser engaged in the business of selling electric energy to the general public, the contract shall provide that the administrator may cancel such contract upon five years' notice in writing if in the judgment of the administrator any part of the electric energy purchased under said contract to the end that the preferential rights and priorities accorded public bodies and cooperatives under this chapter shall at all times be preserved. Contracts entered into with any utility engaged in the sale of electric energy to the general public shall contain such terms and conditions, including among other things stipulations concerning resale and resale rates by any such utility, as the administrator may deem necessary, desirable or appropriate

When Congress specifically re-enacts an existing law that has long been consistently applied and interpreted, it is deemed to have adopted that application and interpretation as its own. *E.g.*, *United States v. Board of Commissioners*, 435 U.S. 110, 134 (1978):

When a Congress that re-enacts a statute voices its approval of an administrative or other interpretation thereof, Congress is treated as having adopted that interpretation, and [the Supreme Court] is bound thereby.

In such circumstances, Congress' failure to revise or repeal the administrative application and interpretation is persuasive evidence that the interpretation is the one favored by Congress. *E.g.*, *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 275-75 (1974):

[A] court may accord great weight to the longstanding interpretation placed on a statute by an agency charged with its administration. This is especially so where Congress has re-enacted the statute without pertinent change. In these circumstances, congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress. We have also recognized that subsequent legislation declaring the intent of an earlier statute is entitled to significant weight.

Accord, Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 381 (1969) (footnotes deleted), in which the Supreme Court held:

[T]he construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong, especially when Congress has refused to alter the administrative construction.

Footnote 6 (con't)

to effectuate the purposes of this chapter and to insure that resale by such utility to the ultimate consumer shall be at rates which are reasonable and nondiscriminatory. Such contracts shall also require such utility to keep on file in the office of the administrator a schedule of all its rates and charges to the public for electric energy and such alterations and changes therein as may be put into effect by such utility.

These principles apply in the present case, where Congress, armed with the knowledge of the long-standing application and interpretation of the preference clause, so very clearly preserved the pre-existing preferences and priorities. The Ninth Circuit correctly ruled to this effect. 686 F.2d at 711.

Unambiguous legislative history supports Congress' intention to preserve the pre-existing preference and priority as it then existed. Thus, the House Commerce Report stated:

In marketing power generated at these Federal hydro projects, Congress provided that BPA is unequivocally obliged by statute to "give preference and priority to public bodies and cooperatives" which terms are defined in section 3 of the Bonneville Power Act. Such public bodies and cooperatives are known as "preference customers." S. 885, as amended by this Committee, does not alter in any way that congressionally-established obligation and priority, not [sic] does the Committee intend that the legislation be construed to alter or modify that obligation and priority.

House Commerce Report, *supra*, 1980 U.S. Code Cong. & Ad. News at 5,990, in Pet. App. at D-61.

Later, the same House Report in its section-by-section analysis stated regarding Section 5(a):

Section 5(a) makes clear that all power sales, including exchange sales, under this bill are subject at all times to the preference provisions of the Bonneville Project Act, as discussed earlier in this report. These provisions retain and assure preference and priority in BPA power sales to public bodies and cooperatives.

Id. at 59, in Pet. App. at D-119.

Later in Part II of the same report, the House Interior Committee stated:

Section 5(a) makes clear that all power sales under this bill are subject at all times to the Bonneville Project Act, particularly Sections 4 and 5 of that Act. This provision therefore retains the preference and priority accorded public bodies and cooperatives in BPA power sales.

House Interior Report, *supra*, at 46, 1980 U.S. Code Cong. & Ad. News at 6,044, in Pet. App. at E-103.

With regard to what is now Section 10(c) (16 U.S.C. § 839g(c) (Supp. 1981)), the House Interior Report stated:

Section 10c expressly preserves the provisions of federal laws by which public bodies and cooperatives are entitled to preference and priority in the sale of Federally generated electric power.

Id. at 57, 1980 U.S. Code Cong. & Ad. News at 6,055, in Pet. App. at E-121.

Despite the long-standing preference, BPA's long-standing policy based upon this preference and the explicit mandate of Congress, BPA, assisted by the petitioners, attempted dramatically to alter its application of the preference provisions by giving the DSIs preference over public bodies and cooperatives for nonfirm energy. Industrial customers of public bodies such as amici in this case have relied on the preferences of those public bodies in planning both their firm and nonfirm power needs. If BPA's new application of the preference provision is upheld, there will be a complete reversal of the preference. In time of power shortage, the DSIs, who previously shared nonfirm energy equally with private utilities *after* the public bodies' secondary energy demands were met, would receive their *full* requirement for nonfirm energy *before* the public bodies receive *any* nonfirm energy whatsoever.

The interpretation of the Regional Act preference provisions urged by BPA and petitioners cannot be reconciled with other Federal power statutes. While petitioners and the BPA argue that section 5(a) of the Regional Act was not intended to preserve the priority of public bodies and cooperatives to nonfirm energy produced by BPA from projects covered by the Bonneville Project Act, they admit that section 10(c) was intended to preserve preference under statutes other than the Bonneville Project Act.⁷ Several of

7. See Brief for Petitioners at 26 n. 81 and Brief for Federal Respondents at 25-26 and 36-37.

the hydroelectric dams in the BPA system were authorized by or are governed by these other statutes.⁸

If section 5(a) is interpreted to deny public bodies and cooperatives priority access to nonfirm power from Bonneville Project Act projects, this interpretation would lead to a strange anomaly. Either Section 10(c) of the Regional Act must then be ignored as it applies to power sources in the regional network governed by these other statutes, or BPA will have to apply different preference rules for power sources authorized by the Project Act and for such sources governed by these other statutes. The former interpretation would lead to an inconsistent application of the same preference provision of the same statute, while the latter would prove unworkable because of the interconnection of energy coming, for example, from the Grand Coulee Dam and from the Bonneville Dam.

As the Ninth Circuit recognized and as respondents have pointed out in their brief, the BPA shift of position is not justified in the law. Nonetheless, BPA and petitioners have labored mightily to erect a tortured argument distorting both provisions of the Regional Act and its legislative history. Their position also cannot be justified by public policy. As

8. BPA has been designated as marketing agent for numerous sources of power in the region developed pursuant to and governed by statutes other than the Bonneville Power Act. A partial list can be found in 22 Fed. Reg. 9,196 (1957), attached as Appendix B hereto. An example of this delegation is Exec. Order No. 8,526 of August 26, 1940, as amended by Exec. Order No. 12,038, 43 Fed. Reg. 4,957 (1978), applicable to Grand Coulee Dam. The Grand Coulee Dam Project, now known as the Columbia Basin Project, is governed by the Federal reclamation laws, including "the Act of June 17, 1902, and all acts amendatory thereto or supplementary thereto." 16 U.S.C. § 835-1 (1976). Those laws contain a specific preference clause to protect the priority access of "municipalities and other public corporations or agencies." 43 U.S.C. § 485h (c) (1976). Chief Joseph Dam, the Dalles Dam, John Day Dam and seven other dams are governed by the Flood Control Act of 1944, ch. 665, 58 Stat. 887 (1944) (codified in scattered sections of 16, 33 and 43 U.S.C.) which contains an explicit clause for "the sale of such power and energy . . . to public bodies and cooperatives." 16 U.S.C. § 825s (1976).

petitioners admit in their own brief, the DSIs are in a unique position among BPA customers to withstand intermittent interruptions of power service for a substantial portion of their load. Brief of Petitioners at 3. The reason for this lies in the nature of their operations. To quote their own brief:

Among BPA's customers only DSI electro-process loads can withstand intermittent interruptions in power service without causing serious disruption or damage to production facilities.

Id. at 8. Yet they would require that BPA service the DSIs' full power requirements before furnishing any nonfirm energy to BPA's preference customers. That reversal of priority would effectively preclude BPA's preference customers from receiving any nonfirm energy in times of shortage, since the DSIs would have priority to nearly 1000 megawatts of nonfirm energy before BPA's preference customers could obtain any nonfirm energy to meet their much more modest needs.

If the court of appeals' decision is not upheld, the one industry which admittedly has gained the most from this region's past abundance of cheap energy and which admittedly can best withstand interruptions in its supply without undue hardship would gain permanent priority access over this interruptible energy at the expense of BPA's preference customers and of those industries which have relied on their access to this energy on the priority basis preserved to them under the Regional Act. Such a result reflects both bad law and bad policy.

CONCLUSION

There is no basis in policy or in the Regional Act for the position advocated by BPA and the DSIs. The Ninth Circuit correctly held that the statutory provisions preserving the existing power preferences clearly and unequivocally apply to give BPA's priority customers prior access to nonfirm power to meet the nonfirm power needs of their customers. There is no need to distort the law. The Ninth Circuit decision should be affirmed.

Respectfully submitted,

GARVEY, SCHUBERT,

ADAMS & BARER

By: DONALD P. SWISHER

ALLAN M. GARTEN

Counsel for Amici Curiae

International Paper Co. and

Longview Fibre Co.

APPENDIX A
UNITED STATES OF AMERICA
BEFORE THE 1983 WHOLESALE POWER
AND TRANSMISSION RATE ADJUSTMENT

Prepared Direct Testimony of
RICHARD P. WOLLENBERG
President and Chief Executive Officer
Longview Fibre Company
1632 Kessler Boulevard
Longview, Washington 98632

ON BEHALF OF
THE ASSOCIATION OF
PUBLIC AGENCY CUSTOMERS

May 23, 1983

- Q. Please state your name and business address.
- A. My name is Richard P. Wollenberg, and my address is 1632 Kessler Boulevard, Longview, Washington.
- Q. What is your educational background?
- A. I received a B.S. in Mechanical Engineering from the University of California in 1936. In 1938, I received a Master of Business Administration degree from Harvard University.
- Q. What is your present occupation?
- A. I am the President and Chief Executive Officer of Longview Fibre Company. I have held this position for five years.
- Q. Prior to assuming your current position as President and Chief Executive Officer of Longview Fibre, what other positions have you held in the company?
- A. I have been with Longview Fibre for 44 years. Before obtaining my present position, I served at various times

as Safety Engineer, Chief Engineer, Vice President and Manager of Container Operations, Executive Vice President, and President. In these various capacities, I have participated in the design and purchase of internal power equipment and in all energy purchase contracts.

Q. What is the purpose of your testimony?

A. Briefly stated, my testimony will describe how Longview Fibre uses electricity, why electricity is essential to Longview Fibre's operations, and how recent electric rate increases have affected Longview Fibre's operations, ability to compete in the national market, and potential new jobs in the Northwest.[2]

Description of Operations

Q. Please describe Longview Fibre's operations.

A. Longview Fibre produces pulp and paper at the Longview, Washington plant. The company has fifteen converting plants in locations around the United States. There are four box plants and one bag plant in the Bonneville service area, and eight box and two bag plants in California, the Midwest, and New England. All of these fifteen converting plants depend on the Longview mill for raw material.

At the Longview plant, we operate on a 24-hours-per-day, 7-days-a-week basis. This plant produces approximately 2,100 tons of finished product each day.

Q. How many people does Longview Fibre employ?

A. The company employs 1,900 people at the Longview mill and 3,300 nationwide. At converting plants located within the Bonneville service area, we directly employ over 300 in Seattle, Yakima, Portland, and Twin Falls. In addition, we create thousands of jobs indirectly for raw material suppliers and service industries.

Raw materials for Longview are trucked from nearby sawmills and barged from regional centers in Lewiston, Idaho, and The Dalles and Boardman, Oregon. Between

350 and 400 people, employed by others, depend upon Longview for jobs transporting raw materials alone. This does not include jobs created by the processing and delivery of chemicals required for our manufacturing, or the shipment of finished products by truck or rail to markets.

Use of Electricity

Q. How is electricity used at the Longview mill?[3]

A. Approximately 83% of our electricity is used for pumps, pulp refining, paper machine drives, fans, and conveying equipment. Approximately 4% is used for lighting, air conditioning and similar loads, and approximately 7% for environmental equipment loads.

A year ago, those numbers were different because we were purchasing 25 megawatts of electricity for the generation of low-pressure steam. That load became uneconomical as a result of the 1982 rate increase and we discontinued use of our electrode boiler. Between March 1, 1983 and June 30, 1983, we will run the boiler on interruptible spill power, purchased under BPA's NF-2 Schedule, but only because of the availability of competitively priced non-firm electricity in the short term. Under present conditions, this use is pure substitution for other fuels, either hog fuel or residual oil, and future use will be determined by the price and availability of electricity. We do not foresee a firm load price that will be competitive with the other fuels which we can use for steam generation. Unless the NF-2 Schedule, plus the serving utility's surcharges, remain near present levels, after June 30th, that load will be dropped. The proposed NF Schedule, if not surcharged heavily by Cowlitz PUD, will barely be economically attractive if spill power is available.

Q. For the years 1979-1982, please describe the amount of electricity purchased at the Longview plant.

A. In 1979, we purchased 870,000 megawatt hours of electricity. That amount decreased to 850,000 megawatt hours in 1981, partly due to curtailments and elimination

of steam generation in the electrode boiler. Because we normally operate on a 7-days-per-week, 24-hours-per-day basis, we are a [4]100% load factor customer of Cowlitz Public Utility District No. 1.

Impact of Electric Rate Increases - Effect on Load

Q. During the years 1979-1982, what conservation efforts has Longview made?

A. During this period, Longview Fibre has introduced many significant, cost-effective conservation measures into its operations. Substantial electricity savings have been realized by equipment and process changes as well as purchasing energy-efficient motors, using adjustable frequency drives, improving pumping efficiencies and changing lighting specifications [sic]. During 1982, we energized approximately 25 adjustable frequency drives, three on major retrofits, the balance on new installations. In addition, it is important to note that for certain operational functions, there is no practical, cost-effective substitute for electricity. We operate several thousand motors to drive pumps, machines, refiners, fans, and the like. These are essential functions and it would be utterly impractical to use any other prime movers.

Q. During the years 1979-1982, how have electric rate increases affected your electricity bills?

A. In 1979, for the Longview plant, our total electric bill was \$3,335,000. Our electric bill escalated to \$5,757,000 in 1980. In 1981, a year of some mill curtailments, our total bill was approximately \$7,910,000, and for calendar 1982, with many mill curtailments, our bill was approximately \$10,250,000.

Q. Your purchased electricity in 1982 (660,000 megawatt hours) was only three-fourths that purchased in 1979 (870,000 megawatt hours), yet your cost in 1982 was roughly three times the 1979 costs. Does this comparison of ratios portend any changes in energy planning?

- A. Paying three times as many dollars for only three-quarters the amount of energy means we paid four times as much for electricity in 1982 as we paid in 1979. This increase has already resulted in dropping our firm load by about 26%. This reduction was achieved through a combination of efforts including cost-effective conservation, and taking our electrode boiler off firm contract. Our energy plan must consider maximizing all potential resources and evaluating alternative energy sources.
- Q. Could the proposed Bonneville rates for 1983 through 1985 further change your plans for purchasing electricity?
- A. Any change in Bonneville's rate to Cowlitz PUD is passed through, with surcharges, directly to us as a consumer. Although Cowlitz PUD has other hydroelectric generating resources, these have been reserved for residential and commercial consumers. Our rate is the Bonneville PF rate plus utility overhead, transmission costs, WPPSS 4 and 5 surcharges, and applicable taxes. If the PF Schedule now proposed is adopted, our average increase would be between 25 and 30% after passage through Cowlitz. Our 1984-85 costs will be five times our 1979 costs. Longview Fibre has cogeneration turbine capacity in excess of 70 megawatts. We currently have an agreement with BPA to deliver up to 45 megawatts to BPA if needed by it. This agreement terminates June 30, 1983. At projected power costs, it would be economically prudent for us to use this turbine capacity for our own loads and further reduce our purchased electricity by 40 to 45 megawatts. If this decision were made, our load on Bonneville would be reduced from 108 megawatts, where it was one year ago, below the 80 megawatts we currently purchase, to 40 megawatts—a load drop of 68 megawatts in a period of one year.[6]
- Q. Do other pulp and paper mills in the Northwest have similar co-generation facilities?
- A. Several large plants do have co-generation systems, or the potential for co-generating electricity.

Q. Could Longview Fibre expand its co-generation capacity or production?

A. We presently have excess turbine generator capacity, in the form of backup systems. It is possible to expand self-generation capability in more than one way and it might become economically feasible to do so if the cost of purchased electricity continues its meteoric rise.

Impact of Electric Rate Increases - Effect on Competition

Q. How would these contingency plans affect your competitive position in the Northwest market?

A. Our concern is not only with our position in the Northwest market, but rather with the market nationally and internationally. Most of the product, like that of others in the Northwest, moves to external markets. Electricity accounts for 5% of our total manufacturing cost. Any increase in that cost dramatically impacts our ability to compete in the broadest sense. This increase has directly affected our competitiveness. Longview Fibre competes vigorously for business across the United States. We ship to Ohio, New York, and Florida, as examples. Notwithstanding the high cost of transportation to these distant markets, we have been able to compete successfully with firms located closer to our market because the low cost of electricity and raw materials compensated for the higher cost of transportation. These cost advantages have been lost in large part due to increases in electric rates. If our power costs continue to increase at the current rate, our ability to compete will be further [7] eroded. We have had to give up part of our business in Florida because we could not afford to meet the price levels.

Impact of Electric Rate Increases - Effect on Jobs

Q. Has the increase in manufacturing costs affected potential jobs at the Longview mill?

A. Most definitely. We projected the construction of a twelfth paper machine at our Longview plant at a cost of \$50 million. This machine would increase our production by 20% and directly result in 100 new jobs. Additional jobs would be indirectly created through the Northwest for service industries and raw material suppliers. We have deferred this project because of the escalating manufacturing costs which impair our competitiveness throughout the country.

It is quite clear that recent and prospective substantial electric rate increases have had and will continue to have a dramatic effect on Longview Fibre's operations. Furthermore, the impact of these increases has directed affected our company's ability to create new job opportunities in Longview and throughout the Northwest.

Q. Does this conclude your testimony?

A. Yes, it does.

ERRATA TO TESTIMONY OF RICHARD WOLLENBERG (Exhibit PA-3)

Page 3, line 1, reads as follows:

"83%"

Page 3, line 1, is changed to read as follows:

"87%"

Page 3, lines 24-25, read as follows:

"... partly due to curtailments and elimination of steam generation in the electrode boiler"

Page 3, lines 24-25, are changed to read as follows:

"... partly due to mill curtailments and conservation measures. In 1982, the amount again decreased, to 660,000 megawatt hours, due to curtailments and elimination of steam generation in the electrode boiler."

Page 6, line 16, reads as follows:

"5%"

Page 6, line 16, is changed to read as follows:

"6%"

APPENDIX B

DEPARTMENT OF THE INTERIOR

Office of the Secretary

[Order 2753, Amdt. 3]

BONNEVILLE POWER ADMINISTRATION MARKETING OF ELECTRIC POWER AND ENERGY NOVEMBER 12, 1957.

This amendment supersedes Amendment No. 2 of Order No. 2753 (22 F.R. 4169) and is issued for the purpose of including in the list appearing in section 1 an additional source of electric power and energy—John Day Dam. The order as amended reads as follows:

SECTION 1. *Designation as marketing agency.* The Bonneville Power Administration is designated as the agency to market available surplus electric power and energy generated at the sources specified in this section pursuant to the specific statutory authority as to each project.

(a) Bonneville Project, pursuant to the Act of August 20, 1937 (50 Stat. 731), as amended;

(b) McNary Dam and Ice Harbor Dam, pursuant to the Act of March 2, 1945 (59 Stat. 10);

(c) Hungry Horse Dam, pursuant to the Act of June 5, 1955 (58 Stat. 270);

(d) The following sources pursuant to the Act of December 22, 1944 (58 Stat. 887):

Albeni Falls Dam.
Big Cliff Dam.
Chief Joseph Dam.
Detroit Dam.
Dexter Dam.
Lookout Point Dam.
The Dalles Dam.
Hills Creek Dam.
Cougar Dam.
John Day Dam.

(e) The following sources, pursuant to the Federal Reclamation laws (Act of June 17, 1902, 32 Stat. 388, and acts amendatory thereof or supplementary thereto):

Grand Coulee Dam.

Chandler Power Plant, Kennewick Division, Yakima Project.

Roza Power Plant, Roza Division, Yakima Project.

SEC. 2. *Contracts.* The Bonneville Power Administrator may, subject to the applicable statutes, enter into contracts for the sale or interchange of electric power and energy in the performance of the functions assigned by section 1 of this order. The Bonneville Power Administrator may, in writing, redelegate to officers and employees of the Administration the authority granted in this section, and he may authorize written redelegations of such authority.

SEC. 3. *Revocation.* Orders Nos. 1994 (9 F.R. 11966) and 2115 as amended (10 F.R. 14211; 11 F.R. 8830; 17 F.R. 5197; 18 F.R. 2831) are revoked.

(Sec. 2, Reorg. Plan No. 3 of 1950; 5 U.S.C. 1952 ed., sec. 133z-15, note)

FRED A. SEATON
Secretary of the Interior.

[F.R. Doc. 57-9474; Filed, Nov. 15, 1951, 8:47 a.m.]

No. 82-1071-CFX Title: Aluminum Company of America, et al., Petitioners
Status: GRANTED v.
Central Lincoln Peoples' Utility District, et al.

Docketed:
December 23, 1982

Court: United States Court of Appeals
for the Ninth Circuit

Counsel for petitioner: Popofsky, M. Laurence, Solicitor
General

Counsel for respondent: Solicitor General, O'Leary, Robert
T., Marshall, Steven C., Waldron, Jay T.,
Alexanderson, Alvin, Greening Jr., Robert M.

| Entry | Date | Note | Proceedings and Orders |
|-------|-------------|------|--|
| 1 | Dec 23 1982 | G | Petition for writ of certiorari filed. |
| 2 | Dec 23 1982 | | Appendix of petitioner Aluminum Co. of America filed. |
| 4 | Jan 6 1983 | | Order extending time to file response to petition until February 26, 1983. |
| 6 | Jan 21 1983 | | Order extending time to file response to petition until February 5, 1983. |
| 8 | Feb 3 1983 | | Order extending time to file response to petition until March 4, 1983. |
| 9 | Feb 4 1983 | | Brief of respondent Federal Respondents in support of petition filed. |
| 10 | Mar 7 1983 | | Brief of respondents Cent. Linc. Peoples Utility District, et al. in opposition filed. |
| 11 | Mar 9 1983 | | DISTIBUTED. March 25, 1983 |
| 12 | Mar 16 1983 | X | Reply brief of petitioner Aluminum Co. of America filed. |
| 13 | Mar 28 1983 | | Petition GRANTED. ***** |
| 15 | Apr 4 1983 | | Order extending time to file response to petition until June 11, 1983. |
| 16 | May 11 1983 | | Order further extending time to file response to petition until July 11, 1983. |
| 18 | Jul 5 1983 | | Order extending time to file response to petition until September 19, 1983. |
| 19 | Jul 11 1983 | | Brief of respondent United States filed. |
| 20 | Jul 13 1983 | | Brief of petitioners Aluminum Co. of America, et al. filed. |
| 21 | Jul 13 1983 | | Joint appendix filed. |
| 22 | Jul 22 1983 | G | Motion of the Solicitor General for divided argument filed. |
| 23 | Jul 26 1983 | | Record filed. |
| 24 | Jul 26 1983 | | Certified original record & C.A. proceedings (1 box) received. |
| 25 | Aug 22 1983 | | Order further extending time to file response to petition until October 10, 1983. |
| 26 | Sep 8 1983 | | Motion of the Solicitor General for divided argument GRANTED. |
| 27 | Oct 11 1983 | | Brief of respondents Portland Gen. Elec. Co., et al. filed. |
| 28 | Oct 11 1983 | | Brief amicus curiae of Amer. Pub. Power Assn., et al. filed. |
| 29 | Oct 12 1983 | | Brief of respondents Central Lincoln Peoples' Utility |

No. 82-1071-CFX

| Entry | Date | Note | Proceedings and Orders |
|-------|-------------|---|-------------------------|
| | | | District, et al. filed. |
| 30 | Oct 12 1983 | Brief of respondent Public Power Council filed. | |
| 31 | Oct 13 1983 | Brief amicus curiae of International Paper Co., et al. filed. | |
| 32 | Oct 18 1983 | CIRCULATED. | |
| 33 | Nov 23 1983 | SET FOR ARGUMENT. Monday, January 9, 1984. (2nd case) | |
| 34 | Dec 17 1983 | X Reply brief of petitioners Aluminum Co. of America, et al. filed. | |
| 35 | Dec 29 1983 | X Reply brief of Federal Respondents in Support of Petitioner filed. | |
| 37 | Jan 9 1984 | ARGUED. | |